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IN THE

# Supreme Court of the United States

NO. 74-840

OCTOBER TERM, 1974

GULF OIL CORPORATION, *Petitioner*

v.

W. H. WOOD, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Gulf Oil Corporation for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case.

## 1. Opinions Delivered in Courts Below

The United States District Court for the Western District of Texas, Pecos Division, entered its Opinion and Judgment on Defendant's Motion For Summary Judgment, on December 5, 1973, by which Petitioner, Gulf Oil Corporation, was granted a partial summary judgment on the question of liability of Petitioner to Respondent, W. H. Wood, for the loss of future net profits, loss of goodwill and loss in the value of the equipment sold by Respondent on the ground that there was no genuine issue as to any material fact regarding Petitioner's liability. The District Court was also of the opinion that the jury should be advised that any damages they found for the plaintiff would be trebled by the Court. A copy of the District Court's opinion is attached hereto as Appendix C.

The Court of Appeals for the Fifth Circuit reversed the District Court on both of the above points, holding that a genuine issue of material fact does exist as to Petitioner's liability to Respondent, and that the jury should not be advised that their damage verdict would be trebled. A copy of the Court of Appeals' Opinion is attached as Appendix B.

## 2. Jurisdictional Statement

The order by which rehearing was denied is dated November 22, 1974, and the Judgment sought to be reviewed is dated August 15, 1974, and copies thereof are attached hereto as Appendix A. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question is Section 1254 of Title 28 of the United States Code, as well as the provision of Supreme Court Rule 19(1)(b).

### 3. Questions Presented

a. Whether a genuine issue of material fact exists regarding Petitioner's liability to the Respondent for loss of future profits, loss of goodwill and loss in value of equipment where:

1. Respondent voluntarily surrendered the service station upon the expiration of his lease from Petitioner and sold all of the stock, equipment and interest in the service station to his brother for what Respondent considered fair value; and
2. Where the only reason given by Respondent for selling out was that he "felt" that Petitioner would not renew his lease, and he could not afford to take a chance on losing part of his investment in his stock and equipment by waiting to see if Petitioner would renew his lease.

b. If a genuine issue of material fact exists as to whether Respondent received the fair market value of his service station business when he sold it to his brother.

c. Whether the jury should be informed of the treble damage feature of the Clayton Act, 15 U.S.C. 15.

### 4. Statute Involved

The statute of the United States, the interpretation and application of which is involved, provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, with-

out respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C.A. Sec. 15)

## 5. Statement of the Case

Respondent operated a service station in Midland, Texas, under lease from Petitioner from April 1, 1968, through March 31, 1972, at which time Respondent sold all of his stock, equipment, and interest in the service station business to his brother for $10,000, which Respondent testified by deposition was a fair value[1], and Respondent voluntarily ceased operating the service station business. Respondent brought this suit, alleging that he is entitled to damages of $100,000 from Petitioner in the form of future net profits, loss of goodwill and loss in the value of equipment on the ground that Petitioner's antitrust violations deprived Respondent of the right to operate the service station as "an independent businessman." A copy of Plaintiff's Original Complaint is attached as Appendix D.

## 6. Reasons Relied on for Allowance of the Writ

1. In holding that a genuine issue of material fact exists with regard to Petitioner's liability to Respondent on the question of whether there were threats of nonrenewal of Respondent's lease, and if so, if these threats caused a forced sale of Respondent's service station business, the Court of Appeals has completely departed from legal precedent, and unless its opinion is reversed, utter chaos will reign in the field of antitrust law.

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1. Wood Dep. p. 58.

The *undisputed* facts disclosed by the record before the Court of Appeals hearing on these issues show:

Respondent originally leased the service station from Petitioner on April 1, 1968, for a term of one year. This lease was renewed for three additional one-year terms beginning April 1, 1969, April 1, 1970, and April 1, 1971, respectively. The proposals from Petitioner's sales representatives to renew the lease on each occasion were submitted to Petitioner's District Office. The first and third proposals were submitted one month and two days prior to the expiration of the lease.[2] The second proposal was submitted *two days* prior to the expiration of plaintiff's lease.[3]

Respondent testified[4] that Petitioner's representative Foster told him in *February, 1971* that he had to buy Purolator filters from Petitioner's distributor or get out of the station. This was the last conversation he ever had with Foster.[5] He also testified that Petitioner's District Manager Malmberg told him in February, 1971 that he would not be satisfied until the Respondent got some Goodyear tires out of the station. Respondent took this as a "threat", even though this was the only statement made by Malmberg.[6] This is the last conversation Respondent ever had with Malmberg.[7]

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2. Barrett Dep. pp. 78-80; Wolford Dep. pp. 45-47; Ex. D-2 Wolford Dep.

3. Barrett Dep. p. 79; Wolford Dep. pp. 42-45; Ex. D-1 Wolford Dep.

4. Wood Dep. pp. 19-24.

5. Wood Dep. p. 24.

6. Wood Dep. pp. 25-27.

7. Wood Dep. p. 70.

Respondent did not inquire of any representative of Petitioner whether his lease would be renewed beginning April 1, 1971, yet it was not approved by Petitioner's District Office until March 9, 1971.[8]

Respondent testified that after his conversation with Foster, he purchased Purolator filters from Petitioner's distributor,[9] and that he got rid of the Goodyear tires after his conversation with Malmberg.[10]

Respondent testified that Barrett had been "hounding" him to lower his gasoline prices; that Barrett told him Petitioner *might* not renew his lease or *might* cancel his lease if he did not lower his gasoline prices; and that in December, 1971 (more than *three months* prior to the scheduled expiration of his lease) he agreed to lower his gasoline prices if Petitioner agreed to allow him to go off 24-hour operation.[11] He further testified that he lowered his gasoline prices on January 1, 1972,[12] and kept them lowered until he gave up the station on March 31, 1972.[13]

The reasons assigned by Respondent for selling his service station business to his brother are found in his testimony quoted in the District Court's Opinion. See Appendix C, p. 38.

Respondent further testified as follows:

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8. Barrett Dep. p. 80; Wolford Dep. pp. 45-47; Ex. D-2 Wolford Dep.
9. Wood Dep. p. 22.
10. Wood Dep. p. 27.
11. Wood Dep. pp. 46-49.
12. Wood Dep. p. 40.
13. Wood Dep. p. 80.

"Q. . . . but did they tell you to get out of the station.

"A. No, they didn't tell me to get out. They just made it pretty obvious that I felt like that was what was going to happen, I was going to get thrown out.

"Q. Oh, you felt like it, but nobody at Gulf ever told you that they were not going to renew your lease?

"A. Not in so many words, they just always said, 'We may not renew your lease,' or 'you may get your lease cancelled.' *They never said, 'We are not going to renew your lease.'*

"Q. So on the basis of that, the fact that they told you that we may or may not renew your lease, and if we do, we are going to raise your rent a hundred and seventy-five dollars, you decided it was time to get out?

"A. I decided I wasn't in no position to ride them out.

"Q. Even though you had a profitable station out here, and were making pretty good money, you decided you just couldn't stay in any longer?

"A. Yes."[14]

The affidavit of Barrett and the application dated February 7, 1972, of Respondent's brother to secure a lease on the service station attached to Gulf's Motion for Summary Judgment (copies of affidavit and application are attached hereto as Appendixes E and F), conclusively establish that Respondent decided to surrender the station and sell his business at least *two months* prior to the expiration of his lease.

In his complaint, Respondent alleged that he surrendered the station solely because he could not run it as an independent businessman. His complaint is devoid

14. Wood Dep. pp. 67-68.

of any allegation that he surrendered the station because of his "feeling" that he "might" lose part of the value of his equipment if Petitioner decided not to renew his lease.

The Court of Appeals neglected to include in its opinion any examples of threats by Petitioner's representatives to terminate Respondent's lease. The record reveals only the one conversation between Respondent and Foster; one conversation between Respondent and Malmberg; and the conversations between Respondent and Barrett in which Respondent testified that Barrett told him that Petitioner *might* not renew his lease, or that Petitioner *might* terminate his lease. The first two conversations with Foster and Malmberg occurred *two months* prior to the renewal of Respondent's lease effective April 1, 1971. Respondent testified that he complied with the alleged demands of Foster and Malmberg and, according to his testimony, he did not thereafter deviate therefrom. Respondent also testified that he agreed in December, 1971, over three months prior to the expiration of his lease on March 31, 1972, that he would lower his gasoline prices in exchange for going off 24-hour operation. Thus, according to the testimony of the Respondent, he was in complete compliance with Petitioner's demands when he lowered his gasoline prices January 1, 1972.

What threats of lease termination present an issue of whether they were "instrumental in forcing Respondent to sell his service station"? Do the alleged threats by Foster and Malmberg present such an issue when Respondent testified they were made prior to his lease being renewed, and that no such similar threats were made subsequent to the renewal? Do the so-called threats by Barrett that Petitioner *might* not renew Respondent's lease, or that

Petitioner *might* terminate it, present an issue for the jury where Respondent has fully complied with the alleged demand? If the Court's answer to any of these inquiries is in the affirmative, a jury is licensed to speculate whether Respondent should be awarded damages solely on the ground that he "felt he had no choice" but to sell, and that he "was in no position to ride them out".

The Court of Appeals cited *Lehrman v. Gulf Oil Corporation*, 464 F.2d 26 (5th Cir. 1972), *Simpson v. Union Oil Co. of Calif.*, 411 F.2d 897 (9th Cir. 1969), *Lessig v. Tidewater*, 327 F.2d 459 (9th Cir. 1964), and *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963) in support of its holding that there is a jury question whether threats by Petitioner's representatives were instrumental in forcing Respondent to sell his service station business. The latter three cases all involved lease terminations or failure to renew. The Court of Appeals went further in *Lehrman* and held that Gulf's action in withholding temporary competitive allowances from Lehrman caused the demise of his business, and that Gulf effectively terminated Lehrman's business through "economic coercion" which had the same effect as lease termination or failure to renew.

In the first appeal of the *Lehrman* case, Gulf argued unsuccessfully that Lehrman was not entitled to damages for loss of future net profits because Gulf had not cancelled Lehrman's lease, nor had it refused to renew the same. Gulf further argued that to allow Lehrman to collect damages for loss of future net profits would be an open invitation to dealers of successful and thriving service stations to abandon their stations and sue for future net profits based upon anti-trust violations by the defendant. To this argument, the Court of Appeals replied:

> "Nor are we persuaded by Gulf's prediction that the awarding of future profits in this context licenses the victims of single antitrust violations to abandon their still-thriving businesses in order to cash in on the bonanza of a future profits judgment. The facts of the present case give no hint that Lehrman abandoned a successful gas station in the hopes of securing a large judgment in his favor. After 1965, Lehrman struggled along until finally it was clear that the station was not worth his while." (464 F.2d 45)

Yet, in spite of the above language, the Court of Appeals has held that the Respondent in this case can abandon his "still-thriving business in order to cash in on the bonanza of a future profits judgment." Especially is this true in view of the fact that the Respondent testified on deposition that Petitioner never told him to get out of the station and never told him that his lease was not going to be renewed. The Court of Appeals has simply ignored Respondent's testimony and has held that a jury is entitled to decide whether the threats of Petitioner's representatives (assuming the jury finds such threats were made) were *instrumental* in forcing Respondent to sell his service station business from which he testified he earned from $6,000 to $10,000 per year in addition to his salary of $150.00 per week,[15] and, if so, award him damages in the form of future net profits.

If the Respondent in this case had raised an issue as to his right to recover damages for loss of future net profits, where will the Court "draw the line"? Will this Court stand idly by while the Court of Appeals for the Fifth Circuit allows dealers of successful service station busi-

15. Wood Dep. pp. 61-63.

nesses to abandon them and sue for future net profits any time they may "feel" that their lease may not be renewed? Suppose a dealer "feels" that he is being coerced into purchasing TBA from his supplier, can he abandon his successful service station business and sue for future net profits? Is a dealer who alleges he is the victim of price discrimination entitled to abandon a successful service station business and collect damages in the form of future net profits?

Subsequent to submission of briefs to the Court of Appeals in this case, the attorney representing the Respondent herein filed suit against Gulf in the same United States District Court in which the present case is pending on behalf of Chester Milson, (Civil Action No. P-74-CA-8) who is also a former Gulf dealer. The charges in the *Milson* case are the same, i.e., price fixing, illegal tie-in, restraint of trade, etc. The plaintiff's theory in that case is that when plaintiff refused to comply with Gulf's illegal demands, Gulf harassed the plaintiff by remodeling the station which interfered with his operations thereof, so the plaintiff abandoned the station prior to the expiration of his lease, and is suing Gulf for future net profits of $100,000, which incidentally is the same sum Mr. Wood is claiming in this case.

Where a plaintiff seeks treble damages for injuries to his business caused by violations of the federal antitrust laws he must allege the manner, nature, character and extent of the injuries sustained and he must allege *facts* from which the injuries accrue and upon which damages may be assessed.[16]

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16. *Bugle v. Thompson*, 138 F.2d 875 (2d Cir. 1943), *cert. denied* 322 U.S. 743; *Alexander v. Texas Company*, 165 F. Supp. 53 (D.C. La. 1958); *Kaeppler v. James H. Matthews & Company*, 180 F. Supp. 691 (D.C. Pa. 1960).

*The damages must be proximately caused by the alleged antitrust violations.*[17]

If Respondent had suffered any loss in value on the sale of his equipment by reason of Petitioner's termination of his lease, or Petitioner's failure to renew the same, and such loss was attributable to antitrust violations by Petitioner, Respondent would have a cause of action therefor. He is not entitled, however, to abandon a "successful and still-thriving" service station business because he felt he had "no choice" because he *might* lose part of the value of his equipment in the event Petitioner did not renew his lease.

If this Court does not halt the precedent shattering and unwarranted extension of the rationale of the *Simpson, Lessig, Osborn* and *Lehrman* cases, it will inevitably lead to fraudulent allegations of antitrust violations by dealers who will simply abandon their successful businesses and sue for future net profits judgments. A defendant would then find itself faced with the dilemma of having to pay "judicial blackmail" or risk having a treble damage judgment based on future net profits entered against it, even though the defendant did not cancel the lease or fail to renew it, and even though the defendant wanted the plaintiff to continue operating the station.

2. While paying "lip service" to the fundamental rule announced in *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971) that in an antitrust suit a plaintiff cannot recover both the difference between the fair market value

17. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Alexander v. Texas Company*, 165 F. Supp. 53 (D.C. La. 1958); *Baim & Blank, Inc. v. Admiral Corporation*, 132 F. Supp. 412 (D.C.N.Y. 1955); *Shotkin v. General Electric Co.*, 171 F.2d 236 (10th Cir. 1948).

and the price received at the time of sale, and the loss of future profits, the Court of Appeals has circumvented the rule in this case. The writer agrees that it is doubtful the Respondent knew the meaning of the term "goodwill" when he testified by deposition. This knowledge or lack of knowledge begs the question, and is completely immaterial. That Respondent sold all of his interest in the service station for full and complete value is conclusively shown by Respondent's deposition testimony quoted in footnote 10 of the Court of Appeals' opinion.[18]

Even though the Respondent may not have known the meaning of "goodwill", it is apparent that he sold *the station*, which included everything he owned, tangible and intangible, and that he got a fair price for it. It is patently obvious that Respondent did not think his service station business had any goodwill, or going concern value.

Assuming, *arguendo*, that Respondent is able to demonstrate the existence of fact questions, regarding a violation of the antitrust laws, Petitioner asserts that the trial court's partial summary judgment in favor of Petitioner should be affirmed with regard to any and all claims for future net profits or other damages incurred in the sale of Plaintiff's service station business to his brother, Kenneth Wood because to do otherwise would permit the jury to award duplicative damages.

To permit any damages to be awarded for future net profits in this case would result in an improper double recovery. An antitrust Plaintiff may not recover future net profits, which his business could have earned, in addition to the full fair market value of that business. *Albrecht v. Herald*, 452 F.2d 124, 126-131, (8th Cir. 1971)

18. App. B, p. 32.

*mandamus denied* (sub. nom. *Albrecht v. Mattes,* 405 U.S. 1063 (1972). *Farmington Dowel Prod. Co. v. Forster Mfg. Co.,* 421 F.2d 61, 81-86 (1st Cir. 1970); *Vandervelde v. Put & Call Brokers & Dealers Ass'n.,* 344 F. Supp. 118, 147-152 (S.D.N.Y. 1972).

The Clayton Act provides in pertinent part:

> "That any person who shall be injured in his *business* or *property* by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages . . . sustained. . . ." 15 U.S.C. § 15 (emphasis added).

Damages awarded under the antitrust laws are to compensate the successful plaintiff for damages to his "business or property", "a term definitely limited to interests in commercial ventures or enterprises." *In re Multi District Vehicle Air Pollution,* (9th Cir. No. 71-1241, June 4, 1973) 1973 CCH Trade Cases at 74,540; *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972). A personal injury theory of damages is in no way relevant to the question of damages in an antitrust case. Any special value which the service station business might have had to Wood *personally* or any value beyond that which was *transferable to a purchaser* of Wood's business is *not* to be considered in determining the amount of damage to his service station business. *Standard Oil Co. of Calif. v. Moore,* 251 F.2d 188, 219-220 (9th Cir. 1957), *cert. denied* 356 U.S. 975 (1958); *Simpson v. Union Oil Co. of Calif.,* 411F.2d 897 (9th Cir. 1969).

In determining the difference in value between what an antitrust Plaintiff's business is worth and what it would have been worth but for the imposition of an illegal re-

straint, courts have generally recognized and awarded damages on the basis of one of two theories—the future net profits theory or the fair market value theory. Note, "Treble Damage Antitrust Suits: Measure of Damages for Destruction of all or part of a Business" 80 HARV. L. REV. 1566 (1967); *Albrecht v. Herald Co., supra; Farmington Dowel Prod. Co. v. Forster, supra; Vandervelde v. Put & Call Brokers & Dealers Ass'n., supra; Standard Oil Co. of Calif. v. Moore,* 251 F.2d 188, 219-220 (9th Cir. 1957) *cert. denied,* 356 U.S. 975 (1958); *Simpson v. Union Oil Co. of Calif.,* 411 F.2d 897 (9th Cir. 1969). An antitrust Plaintiff, however, cannot recover damages for lost net future profits in addition to recovery of the full fair market value of his business as alleged in Wood's complaint. Even if Wood were entitled to damages to the market value of his service station business or if he were entitled to lost future net profits, he is clearly *not* entitled to *both. Albrecht v. Herald, supra* at 126-131; *Farmington Dowel Prod. Co. v. Forster Mfg. Co., supra* at 81-86 (1st Cir. 1970); *Vandervelde v. Put & Call Brokers & Dealers Ass'n., supra* at 147-152; *Simpson v. Union Oil Co. of Calif., supra* at 908-910; *Standard Oil Co. of Calif. v. Moore, supra* at 219-221; see also *McGinnis Piano & Organ Co. v. Yamaha Int'l. Corp.,* 480 F.2d 474 (8th Cir. 1973).

Consideration of the future net profit potential of a business is a recognized and essential factor in determining the fair market value of a business as a going concern. In the *Albrecht* case, the jury awarded damages for lost future profits *and* for injury to the fair market value of the business. On appeal, the Eighth Circuit held that such an award was duplicitous and, therefore, erroneous since,

> "The prospect of future earnings is considered in arriving at the fair market value of a given business. . . . " *Albrecht* at 131.

In measuring the fair market or goodwill value of service station businesses injured by violations of the antitrust laws, the Ninth Circuit[19] has also recognized that future net profits are considered in determining fair market value.

In economic theory, the fair market value of a business is simply the "discounted present value of the estimated flow of future earnings" from that business. See Watkins, "Monetary Recovery Under Federal Antitrust Statutes," 45 TEX. L. REV. 856, 876 (1967); Note, "Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of all or part of a Business." 80 HARV. L. REV. 1566, 1580 (1967).

This Court should, therefore, decide whether or not an antitrust plaintiff is precluded from any recovery of lost future net profits, if that Plaintiff has recovered, as evidenced by his own testimony, the fair market value of his business.

If this Court does not reverse the opinion of the Court of Appeals, "the door" will be opened through which antitrust plaintiffs may pass preparatory to their journey along a "highway paved with gold" in their quest to "cash in on the bonanza of a future profits judgment."

3. In holding that informing the jury on the treble damage feature of the Clayton Act, "serves no useful function and its probable consequence would be harmful —an impermissible lowering of the amount of damages,"[20] the Court of Appeals has overlooked the fact that jurors

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19. *Standard Oil Co. of Calif. v. Moore, supra* and *Simpson v. Union Oil Co. of Calif., supra.*

20. Op. p. 6915, App. p. 27.

are aware of the treble damage feature and that without appropriate instructions concerning those damages, jurors will be confused and will render improper verdicts.[21] It is unrealistic to think that all jurors are ignorant of the impact of the antitrust laws. For example, recent stories about the IBM and General Telephone antitrust litigation have covered the front pages of local as well as national newspapers and periodicals and have been carried by both the major TV networks and local TV stations. It is inevitable that at least some of the jurors are aware of treble damage antitrust litigation before they are actually chosen for a panel in such a case. The jury must be told that their function is to determine only the amount of damages to a Plaintiff's business or property and that the Court will treble those damages and award attorneys fees

Failure to instruct the jury on the treble damage feature marks a departure from the modern and enlightened trend toward fully informing the jury of the law and the effect of its answers. As stated in 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2509 at 513 (1971):

> ". . . an attempt to keep the jury in the dark as to the effect of its answers, is likely to be unavailing, and there is always the danger that *the jury will guess wrong about the law. . . .*"[22]

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21. The Court has also overlooked the fact that because of the punitive nature of the antitrust laws, the jury may improperly increase the amount of damages it awards in order to punish a violator rather than to award only compensatory damage if it is not instructed that the Court will treble the damages it awards.

22. See also J. BROWN, FEDERAL SPECIAL VERDICTS: THE DOUBT ELIMINATOR, 44 F.R.D. 338, 341; E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS, § 1906 at 281-282 (1965); "Private Treble Damage Antitrust Suits: Measure of Damages for the Destruction of All or Part of a Business," 80 HARV. L. REV. 1566, 1569 n. 20 (1967).

The Court of Appeals' decision effectively blindfolds the jury to an important and relevant portion of the governing statute. In other areas of the law, this is not the practice. In cases pertaining to the Federal Employers Liability Act, the Labor Management Relations Act, the Federal Criminal Statutes, and the Internal Revenue Code, the jury is informed of the governing law.[23] In cases involving Federal regulatory statutes, it is not only sound judicial policy to inform the jury of the statutory law upon which the action is based, but it is essential in order to prevent confusion, misunderstanding and the threat of an erroneous and unenlightened verdict. As the Second Circuit stated in *Bordanero Brothers Theaters, Inc. v. Paramount Pictures,* 203 F.2d 676 (2d Cir. 1953), "Surely reference to the governing statutes is so usual a course in jury trials as to occasion no comment." Recognizing that the principal purpose of the treble damage provision is to deter antitrust violations and that such provision is punitive in nature is all the more reason that the *jury should be fully informed that it is the duty of the judge, not the jury, to perform the mandatory trebling,* and that the jury only

23. See *Batsell v. United States,* 403 F.2d 395, 400 8th Cir. 1968), *cert. denied* 393 U.S. 1094 (1969) "'The Court may and generally should, where the law governing a case is expressed in a statute, employ the language of the statute in its instruction.'" *Williams v. United States,* 328 F.2d 256 (8th Cir. 1964); *Maynard v. United States,* 215 F.2d 336, 339 (D.C. Cir. 1954), "even in criminal cases, it is held as a general rule that where the law governing a case is expressed in a statute the Court in its charge should use the language of the Statute;'" *LaBarge Water Well Supply Co. v. United States,* 325 F.2d 798 (8th Cir. 1963); *Terminal Railroad Association of St. Louis v. Howell,* 165 F.2d 135 (8th Cir. 1948), "'It would be strange indeed if it could be said to be error to lay down the law in the exact language of the statute upon which the action is based;'" *Fritz v. Pennsylvania Railroad Company,* 185 F.2d 31 (7th Cir. 1950); *United Electrical R. & M. Workers v. Oliver Corporation,* 205 F.2d 376 (8th Cir. 1953).

determines the amount of compensatory damages. The jury's purpose in an antitrust case is *not* to punish the antitrust violator, it is simply to determine the amount of damages to the plaintiff's business or property.

Because of the division of authority on the question of giving an instruction on the treble damage provision, which has been recognized by the Court of Appeals,[24] this Court should consider the question of instructing the jury as to the treble damage feature of the Clayton Act.[25]

## CONCLUSION

Wherefore, Gulf Oil Corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case.

Respectfully submitted

CATHERINE C. McCULLEY
WILLIAM F. ERWIN, JR.
*Attorneys for Gulf Oil Corporation*
*Petitioner*

By_____

24. Op. p. 6914, App. p. 26.

25. Additional authorities favoring informing the jury of the treble damage provision of the antitrust law include *Viking Threatre Corp. v. Paramount Film Distributing Corp.*, 1961 C.C.H. Trade Cases, ¶ 70,051 (E.D. Pa. 1960); *Woods Exploration and Producing Co. v. Aluminum Co. of America* (C.A. No. 14,669 S.D. Tex. Hou. Div. 1962); *Carpa, Inc., et al v. Ward Foods Inc.* (W.D. Tex. C.A. No. CA-71-CA-19); *City of San Antonio v. Westinghouse Electric Corporation, et al* (W.D. Tex., C.A. 3064, September 9, 1964); *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa., 1973); *Cape Cod Food Prod. v. Nat'l Cranberry Ass'n*, 119 F. Supp. 900 (D.C. Mass., 1954).

## CERTIFICATE OF SERVICE

I, William F. Erwin, Jr., hereby certify that a correct copy of the foregoing petition for writ of certiorari was served on counsel for W. H. Wood by depositing a copy of the same, postage prepaid, in the United States mail this_____day of January, 1975.

_____

**APPENDIX A**

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 74-1661

D. C. Docket No. CA P-72-40

W. H. WOOD, Plaintiff-Appellant,
versus
GULF OIL CORPORATION, Defendant-Appellee.

*Appeal from the United States District Court*
*for the Western District of Texas*

Before TUTTLE, WISDOM and GEE, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part and dismissed in part;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 15, 1974

Issued as Mandate:

# United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

November 22, 1974

TO ALL COUNSEL OF RECORD

Re: 74-1661 WOOD v. GULF OIL CORPORATION

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ ANNE G. PARENT
Deputy Clerk

cc: Mr. Jack N. Price
Mr. Allen Moore
Mr. Charles N. McDonald
Messrs. W. B. Edwards
William F. Erwin, Jr.
Mrs. Catherine C. McCulley

## APPENDIX B

POLLOCK & RILEY, INC., Plaintiff-Appellee,
v.
PEARL BREWING COMPANY, Defendant-Appellant.

W. H. WOOD, Plaintiff-Appellant,
v.
GULF OIL CORPORATION, Defendant-Appellee.

Nos. 73-3771, 74-1661.

# United States Court of Appeals

FIFTH CIRCUIT

Aug. 15, 1974.

Civil antitrust actions were brought seeking treble damages under the Clayton Act. In one case, the United States District Court of the Western District of Texas, John H. Wood, Jr., J., 362 F. Supp. 335, granted plaintiff's motion precluding reference to treble damage provisions in presence of jury. In second case, the District Court, Ernest Guinn, J., denied a similar motion, granted partial summary judgment for defendant on question of liability for loss of future net profits, good will and fair market value of plaintiff's service station equipment and denied plaintiff's proffer of evidence admitted in a prior case involving a similar antitrust suit against defendant. Interlocutory appeals in the two cases were consolidated. The Court of Appeals, Tuttle, Circuit Judge, held that jury should not be advised in a civil antitrust suit of Clayton Act provision tripling awarded damages and allowing attorneys' fees

and costs; that genuine issues of material fact existed with respect to whether defendant in second case was liable for plaintiff's alleged loss of future profits, good will and fair market value of service station equipment, thus precluding partial summary judgment on that issue; and that appeal would not lie from the pretrial ruling excluding evidence.

Affirmed with respect to first case; decision in second case reversed in part and appeal dismissed in part.

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Appeals from the United States District Court for the Western District of Texas.

Before TUTTLE, WISDOM and GEE, Circuit Judges.

TUTTLE, Circuit Judge:

On review are consolidated interlocutory appeals in two civil anti-trust actions. The primary issue before the Court is the appropriateness of advising the jury that under the provisions of 15 U.S.C.A. § 15[1] any awarded damages would be tripled and a reasonable attorneys' fee plus the cost of the litigation granted.

## FACTS

Prior to the voir dire of the jury and the commencement of the trial, in the first named case, Pollock & Riley, Inc. v. Pearl Brewing Co., the plaintiff-appellee, Pollock &

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1. This provision states:
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorneys' fee."

Riley, Inc., filed a motion in limine requesting that the district court instruct the defendant-appellant and all defense witnesses to refrain from referring or alluding to, in the presence of the jury, the treble damage and attorneys' fee provision of the Clayton Act. The district court granted appellee's motion. Appellant has entered an appeal from the district court's interlocutory order under 28 U.S.C.A. § 1292(b) on this single question.

The second suit, Wood v. Gulf Oil Corp., poses three questions determined by an interlocutory order of the district court and appealed under 28 U.S.C.A. § 1292(b). During pre-trial matters, the plaintiff-appellant, Wood, filed a motion in limine to restrict any reference at any stage of the trial to the treble damage provision of the anti-trust laws. Defendant-appellee, Gulf Oil Corp., opposed the motion, asking the court to inform the jury of the treble damage provision. The district court denied the motion, ruling that the jury should be so advised. In this same interlocutory order, the district court granted partial summary judgment for the appellee on the question of liability for the loss of future net profits, good will, and the fair market value of the plaintiff's service station equipment, and denied appellant's proffer of evidence admitted in the case of Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972), involving a similar anti-trust suit against Gulf.

## TREBLE DAMAGE INSTRUCTIONS

[1] The identical question before this Court in both cases is whether a district court should advise the jury in a civil anti-trust suit of the provision tripling the awarded

damages and allowing attorneys' fees and costs. There is direct conflict in the district court decision before us—one district court forbade revelation, and the other ordered that the jury be informed.[2] Having considered the policies and reviewed the authorities carefully, we hold that the jury should not be advised of the mandatory tripling provision of 15 U.S.C.A. § 15.[3]

The primary policy supporting our decision is that underpinning the tripling provision itself. The purpose of treble damages is to deter violations and encourage private enforcement of the anti-trust laws.[4] The justifiable fear of anti-trust plaintiffs is that the juries will adjust the damage award downward or find no liability, therefore thwarting Congress's purpose, because of some notions of a windfall to the plaintiff. One court has even suggested that a jury might take the revelation of the treble damage provision as an intimation from the court to restrict the amount of damages.[5] In sum, we agree with the Court of Appeals

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2. This conflict is more significant and demanding of a resolution because both decisions are from district courts in the same district, the Western District of Texas.

3. *See* Semke v. Enid Automobile Dealers Association, 456 F.2d 1361 (10th Cir. 1972); Sablosky v. Paramount Film Distributing Corp., 137 F. Supp. 929 (E.D. Penn. 1955); Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4 (D.D.C. 1955), rev'd. on other grounds, 100 U.S. App. D.C. 161, 243 F.2d 418, cert. denied, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957). *Contra* Bordonaro Brothers Theaters v. Paramount Pictures, 203 F.2d 676 (2d Cir. 1953); Cape Code Food Products v. National Cranberry Association, 119 F. Supp. 900 (D. Mass. 1954).

4. *See* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-752, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); Comment, Private Triple Damage Anti-Trust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv. L. Rev. 1566, 1566-67 (1967) (hereinafter cited as Treble Damages).

5. Webster Motor Car Co. v. Packard Motor Car Co., *supra*, 135 F. Supp. at 11.

for the Tenth Circuit[6] that informing a jury would serve no useful function and its probable consequence would be harmful—an impermissible lowering of the amount of damages.

[2] Second, it is not for the jury to determine the amount of a *judgment*. Its function is to compute the amount of *damages*. Congress's authorization in 15 U.S.C.A. § 15 to triple the award of damages is a matter of law to be applied by the district court without interference from the jury. The fact that the awarded amount will be tripled has no relevance in determining the amount a plaintiff was injured by the anti-trust violation.

The basic point urged against this holding is jury confusion. It is asserted that the treble damage feature of the anti-trust law has been publicized enough so that jurors might have some knowledge of it. The argument goes that a little knowledge without a complete explanation from the court will result in totally erroneous verdicts and damage awards.[7] Our immediate reaction is that a district court can sufficiently instruct the jury to determine only *actual* damages. In those cases where an accidental revelation occurs, the court can give curative instructions to alleviate confusion. *Cf.* Standard Industries, Inc. v. Mobil Oil Corp., 475 F.2d 220 (10th Cir.), cert. denied, 414 U.S. 829, 94 S.Ct. 61, 38 L.Ed.2d 63 (1973).

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6. Semke v. Enid Automobile Dealers Association, *supra*, 456 F.2d 1361.

7. One treatise writer explained:
"Unless the trebling provision is clearly explained to the jury, basic misunderstanding may arise which would result in totally erroneous verdicts and judgments. For example, the jury might accept treble the amount of damages with the effect that plaintiff would recover nine times the amount of the actual damages. Or the jury might divide the amount of damages by three." Timberlake, Federal Treble Damage Anti-trust Actions, § 19.06 at 281-82. (1965).

## WOOD v. GULF OIL CORPORATION

In Wood v. Gulf Oil Corp., the plaintiff-appellant is alleging violations of the anti-trust law which give rise to damages at two different times. First, the appellant sets out various actions alleged to constitute anti-competitive practices which occurred while the appellant was *doing business* as a service station dealer for Gulf Oil Corp. and which gave rise to post losses for plaintiff during this period. Second, the plaintiff alleges specifically that Gulf's threats not to renew his lease forced him to sell his service station resulting in loss of future profits, good will, and the fair market value of his service station equipment. The district court granted partial summary judgment against the appellant on the latter claim of Gulf's liability for loss of future profits, good will, and fair market value of the service station equipment. The appropriateness of the granting of the partial summary judgment is now before the Court on interlocutory appeal. We reverse.

Clarification of our holding can be derived from an examination of the district court's language in its partial summary judgment order. The court first ruled on what issues would be left open for trial:

> "The extent of the threats, if any, of the Defendant, the nature of those threats, the period covered by the alleged threats are disputed questions of fact and the Court has determined that if the Plaintiff is able *to establish threats to terminate his lease or to refuse to renew same,* unless Plaintiff used Gulf accessories and ceased to use accessories of other companies and ceased charging a higher price than the price Gulf wanted retailers to charge, such conduct would constitute anti-trust violations and Plaintiff can recover the damages, if any, he may establish

> commencing January, 1971—the day he states the threats commenced—until March, 1972, when he disposed of the station." (Emphasis added).

Next the district court discussed the issue on appeal:

> "The Court is convinced that had Plaintiff waited and had Defendant refused to renew the lease, proof of threats to do so would constitute anti-trust violations and he could have recovered future damages. However, the Plaintiff voluntarily disposed of his equipment and the lease and Defendant never refused to renew it. The mere threat or a refusal to renew the lease does not constitute sufficient grounds for the Plaintiff to dispose of his property and lease and then seek damages. Had Defendant refused to renew the lease, then all of the alleged threats would have been admissible to establish that Defendant refused to renew because Plaintiff used other accessories, charged higher prices for gasoline, etc., which would constitute anti-trust violations. . . Plaintiff's conduct was premature if Defendant intended to refuse to renew his lease so far as future profits are concerned."

[3] If the threats to terminate appellant's lease can constitute a violation of the anti-trust law for purposes of granting damages for part of the period of occupancy, January, 1971 until March, 1972, then we do not understand why such threats would not constitute a violation of the anti-trust law if they were instrumental in forcing appellant to sell his service station.[8] The anti-trust law

8. *See* Lehrman v. Gulf Oil Corp., 464 F.2d 26, 44-47 (5th Cir.), cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972); Simpson v. Union Oil Co. of California, 411 F.2d 897, 908-910 (9th Cir.), rev'd. on other grounds, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969); Lessig v. Tidewater, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964); Osborn v. Sinclair Refining Co., 324 F.2d 566, 572-573, n. 9 (4th Cir. 1963).

does not require a plaintiff to retain possession of a business oppressed by anti-trust violation until the business is bankrupted or directly shut down by the violator.[9] Lehrman v. Gulf Oil Corp., *supra*, 464 F.2d at 45.

[4] We certainly agree with the district court that appellant may have *voluntarily* disposed of his dealership by sale to his brother, and that there may have been no substantial threats of non-renewal or that the threats did not cause the sale. But this is in dispute, resulting in a genuine issue of material fact regarding Gulf's liability on this issue, as to whether there were threats and if so, if they caused a forced sale.

The defendant-appellee argues that even if there is a factual dispute on the existence of an anti-trust violation, the partial summary judgment can be affirmed because there were no damages caused by the threats to fail to renew the lease. In essence, appellee contends that the appellant testified in his deposition that he received a fair market value for his service station, therefore, incurring no loss of future profits, good will, or value on his equipment.

[5] We agree with the fundamental point that a plaintiff cannot recover in an anti-trust suit both the difference between the fair market value and the price received at the time of the sale, and the loss of future profits. Albrecht v. Herald Co., 452 F.2d 124 (8th Cir. 1971), mandamus denied, 405 U.S. 1063, 92 S.Ct. 1493, 31 L.Ed.2d 810 (1972); Treble Damages, 80 Harv.L.Rev. at 1566, 1577-86 (1967). In *Albrecht*, the plaintiff was forced to sell

9. In the instant case, the plaintiff should not be penalized in his recovery of damages, if he can show liability, because he took action, the sale of his service station, which tended to mitigate his damages.

his paper route at less than fair market value because of the defendant's anti-trust violations. The damage award fell into three categories and was similar to the request in this case:

> "(1) Plaintiff's damage prior to sale, consisting of profits lost in the operation of the business by reason of Globe-Democrats competition;
>
> "(2) The difference between the fair market value of plaintiff's business (with all of his customers intact) at the time of the sale and the actual sale price received; and,
>
> "(3) Loss of future profits following the forced sale."

Albrecht v. Herald Co., *supra*, 452 F.2d 126.

The court there thoroughly reviewed the precedents and held item three inapplicable as unjustly allowing double recovery. The court reasoned:

> "It is our opinion that the plaintiff had received all permissible damages under items one and two, damages occasioned prior to the sale and the full market value on the sale of his route as a going concern, free of the restrictive practices. This value is figured on the basis of his reconstituted route with all 1200 customers. Fair market value would be that price a willing seller could secure from a willing buyer, and the evidence establishes $24,000 as the maximum price attainable . . . The prospect of future earnings is considered in arriving at the fair market value of a given business. Here, undoubtedly the value of the route rested not in its tangible assets of an old truck and paper wrapper (valued $600), but in the exclusive contract of distribution of a well regarded newspaper in a given area. Whatever that fair market value might be, plaintiff had received it. Capital-

> izing and discounting future profits is one method of figuring present value, but this does not mean that a person is entitled to present value plus future profits." *Id* at 131.

Similarly in the instant case, if there had been no disputed fact concerning whether appellant received the fair market value for his service station, then the partial summary judgment would have been properly granted. The record and briefs reflect, however, that there is grave doubt whether appellant knowingly admitted receiving a fair market value. For instance, the testimony in appellant's deposition indicates that he did not know what "good will" was, so that it is improbable that any admission of receipt of a fair market value took into consideration value for good will.[10] Therefore on both the issue of

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10. The dialogue in appellant's deposition states:
"Q. So you decided then to get out?
A. Correct.
Q. And you made a deal with your brother?
A. Right.
Q. Did your brother buy all your stock and equipment from you?
A. Yes, sir.
Q. Did he pay you a fair price for it?
A. Yes, sir.
Q. You don't have any complaint about the price you got for your stock and equipment?
A. No, sir.
Q. You realized full value for your stock and equipment?
A. Yes, sir, by selling it.
Q. By selling it?
A. Yes, sir.
Q. You didn't lose any money by selling your stock and equipment to your brother?
A. No, sir.
Q. Gulf didn't have anything to do with it, you all made the trade by yourself?
A. No, we didn't make a trade, I offered it to him at a certain price, and he accepted it, and we—
Q. Well, you made a trade, you said, 'all right, I'll sell it at this price,' and he said, 'O.K., I'll buy it from you.'?

liability and damages,[11] there are disputed issues of material fact which make summary judgment improper.

[6] Concerning the third issue, we find that appeal does not properly lie under 28 U.S.C.A. § 1292(b).[12] The order appealed from is a pre-trial ruling excluding evidence admitted in the case of Lehrman v. Gulf Oil Corp., *supra*, 464 F.2d 26, which involved a similar anti-trust action against Gulf. This issue is not one that con-

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A. Correct.
Q. Whatever the price was, you were both satisfied?
A. Right.
Q. Did you have any good will connected with the station?
A. What do you mean by good will?
Q. I don't know, whatever good will is, do you know what good will is?
A. Well, good will consists of—anything you want it to consist of, I guess.
Q. Well, did you have any connected with the station?
A. No, sir, I sold the station for exactly what I give for it, so I don't guess there was any good will.
Q. All right, sir, so you sold it for what you thought was a fair value?
A. Right."

11. Of course in determining the fair market value, whether by capitalizing and discounting future profits or estimating loss of good will and the value of the service station equipment, the $10,000 received will necessarily have to be set off.

12. This provision states:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

stitutes a controlling question of law or one that can possibly advance the ultimate termination of the litigation. Control Data Corp. v. International Business Machine Corp., 421 F.2d 323 (8th Cir. 1970); 9 Moore's Federal Practice ¶ 110.22 [2] (2nd Ed. 1973). As the court explained in *Control Data,* where a similar pre-trial ruling excluding evidence was denied appeal:

> " . . . When such issues become 'ripe,' the district court trying the case will have the benefit of all factual proof governing the question of relevancy. If an offer of proof is made, the trial court will have the benefit of the complainant's specific theory as to the use of the evidence and will likewise be able to evaluate the admissibility question on the basis of specific objection made. In this context a trial court will be able to make a ruling and this court will be able to pass upon the merits of a litigated question. Our ruling is in no way intended to undermine the salutary value of the consolidated pre-trial order. . . . However, if in any trial certain evidence precluded by pre-trial order becomes relevant by reason of development of proof at trial, it could be reversible error to blindly adhere to the prior order. In this sense we feel questions relating to admissibility of evidence must always and ultimately relate to the trial court's actual ruling in view of the record there existing." 421 F.2d at 327.

This reasoning was also echoed by Moore in his treatise:

> "It is necessary, however, that the order involve a clearcut question of law against a background of determined and immutable facts. For that reason such matters as the sufficiency of pleadings and *pre-trial rulings as to the admissibility of evidence* are not ordinarily certifiable [under section 1292(b)]. Nor are matters that are entrusted to the discretion of

> the district court if all that is involved is the manner in which the discretion is exercised." (Emphasis added). 9 Moore's Federal Practice ¶ 110.22[2] at 261.

The appeal on this issue is dismissed.

The decision of the district in Pollock & Riley, Inc. v. Pearl Brewing Company, is affirmed; the decision in Wood v. Gulf Oil Corporation, is reversed in part and the appeal is dismissed in part.

## APPENDIX C

IN THE

# United States District Court

FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

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NO. P-72-CA-40

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W. H. WOOD,

v.

GULF OIL CORPORATION

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## OPINION AND JUDGMENT ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Came on to be considered the Defendant's Motion for Summary Judgment and the Court having considered same, together with the depositions and interrogatories and exhibits filed herein and the arguments of counsel, does make the following determination:

The Court denies the complete Summary Judgment but has determined that a partial summary judgment should issue as hereinafter set out.

The Court grants a partial Summary Judgment in favor of the Defendant on the question of liability of the Defendant to Plaintiff for the loss of future net profits, loss

of good will and loss in the value of the equipment sold by Plaintiff on the ground that there is no genuine issue as to any material fact regarding Defendant's liability on this matter.

The undisputed evidence as set out in the Plaintiff's Reply Brief to the Motion for Summary Judgment, from Page 7 to the middle of Page 11, contains the charge and evidence offered by Plaintiff, that commencing in January 1971 the representative of the Defendant GULF, Mr. Malmberg, commenced a course of conduct designed to cause Plaintiff to cease using oil filters of other companies and Goodyear tires and to use Gulf accessories exclusively. And in addition, to reduce the price of his gasoline.

The extent of the threats, if any, of the Defendant, the nature of those threats, the period covered by the alleged threats are disputed questions of fact and the Court has determined that if the Plaintiff is able to establish threats to terminate his lease or to refuse to renew same, unless Plaintiff used Gulf accessories and ceased to use accessories of other companies and ceased charging a higher price than the price Gulf wanted its retailers to charge, such conduct would constitute anti-trust violations and Plaintiff can recover the damages, if any, he may establish commencing January 1971—the date he states the threats commenced—until March 1972 when he disposed of the station.

The Court has determined that the Plaintiff can not recover for his own act of disposing of the station when *there is no evidence* that the Defendant refused to renew the lease and thereby caused him to dispose of the station. Plaintiff's testimony is:

". . . in the last six months . . . there were several times the lease subject was brought up, that it might not be renewed or it may be cancelled. . ."

"Q. And from that you decided you could no longer continue?

A. From that I decided I had no choice." (Page 10 of Plaintiff's Reply Brief to Defendant's Motion for Summary Judgment).

The Plaintiff further testified:

"Q. So the reason you got out of the station you just did not figure you could run this thing as an independent businessman, is that correct?

A. That's one of the reasons, and I did not feel I was in a position to gamble on them renewing my lease or not renewing my lease, because if they hadn't have renewed my lease, I could not have sold my equipment for nowhere near what I had in it, and I wasn't in no position to take that gamble, or to take that chance." (Page 11 Plaintiff's Reply to Defendant's Motion for Summary Judgment).

The Court is convinced that had Plaintiff waited and had Defendant refused to renew the lease, proof of threats to do so would constitute anti-trust violations and he could have recovered future damages. However, the Plaintiff voluntarily disposed of his equipment and the lease and Defendant never refused to renew it. The mere threat of a refusal to renew the lease does not constitute sufficient grounds for the Plaintiff to dispose of his property and lease and then seek damages. Had Defendant refused to renew the lease, then all of the alleged threats would have been admissible to establish that Defendant refused to renew because Plaintiff used other accessories, charged higher prices for gasoline, etc., which would constitute

anti-trust violations. This is similar to the discharge of a person who has no fixed term of employment—he can not be discharged if it is brought about by his exercising a constitutional right. In such event his discharge would be wrongful and he could recover damages. Plaintiff's conduct was premature if Defendant intended to refuse to renew his lease so far as future profits are concerned.

The Court deems that this is a proper case to submit these questions to the Fifth Circuit for determination before the trial of the case.

The Court is of the opinion that his order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The Plaintiff has bottomed his case on the Fifth Circuit opinion of *Lehrman v. Gulf*, 264 F.2d 26 (5th Cir. 1972) Cert. denied, 409 U.S. 1077 (1972). The Plaintiff's position is that this case and the *Lehrman* case are identical in facts and that the law in the *Lehrman* case controls this case. The Plaintiff's position is that evidence admitted in the *Lehrman* case is admissible in this case and has made considerable discovery on this issue. The admission or exclusion of this evidence would determine the extent of the trial and the record in this case. The Court has decided that the evidence in the *Lehrman* case is not admissible in this case and would have no bearing on the ultimate issue here involved. The one issue in this case is whether or not the Defendant coerced the Plaintiff by threatening to cancel or not renew his lease. The *Lehrman* case involved improper conduct on the part of the Defendant in the use of "temporary competitive allowances" to retail dealers.

In the *Lehrman* case the Defendant withdrew "temporary competitive allowances" because of a price reduction by the Plaintiff. The Court has determined that the threat to cancel the lease would constitute basis for damages suffered from the time the threats commenced until the Plaintiff voluntarily disposed of his lease, but that a recovery can not be had based upon cancellation of a lease when the Defendant never cancelled the lease or refused to renew the lease. In other words, the Plaintiff can not recover for an illegal act which has never occurred and the Defendant never refused to renew the lease or cancel the lease. Consequently, the admission or exclusion of evidence relating to future profits would materially contribute to the time consumed in the trial of this case and the record on appeal.

The issue is in dispute as to whether or not a jury should be advised of the treble damage issue in this case. It is the position of Plaintiff that the jury should not be advised that damages found by the jury will be trebled, and it is the position of the Defendant that the jury should be so advised. This Court has determined that the jury should be so advised that the damages found by the jury will be trebled. This issue has not been finally determined by the Fifth Circuit.

Therefore, the Court requests the Court of Appeals to permit an appeal to be taken from this Order if an application is made to it within ten (10) days after the entry of the Order, and this Court will enter an Order staying further proceedings in this Court should an application be made.

ENTERED THIS 5th day of December, 1973.

/s/ ERNEST GUINN
United States District Judge

## APPENDIX D

IN THE

# United States District Court

FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

---

CIVIL ACTION NO. P-72-CA-40

---

W. H. WOOD,

v.

GULF OIL CORPORATION

---

## PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE COURT:

W. H. WOOD, hereinafter called Plaintiff, presents this original complaint aaginst GULF OIL CORPORATION, hereinafter called Defendant.

### I.

*Parties*

W. H. Wood, Plaintiff, is a resident of Midland, Midland County, Texas.

Defendant, Gulf Oil Corporation, is a Pennsylvania corporation, having its home office and principal place of business in Pittsburgh. It may be served with citation by serving its registered agent for purpose of service.

## II.

*Nature of Suit*

This action is brought by the Plaintiff against the Defendant under Section 15 of Title 15 of U.S.C., being part of the Act of Congress on July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies," as amended, commonly known as The Sherman Act, the Clayton Act, the Robinson-Patman Anti-Discrimination Act. The violations of the antitrust laws, and the practices and policies of the Defendant, pursuant to which the violations occurred, directly affect trade and commerce among the several states, and the Defendant GULF OIL CORPORATION is in the business of wholesale distribution of gasoline and gasoline products, tires, batteries, and accessories, in interstate commerce, pursuant to which there is a constant and continuous stream of trade and commerce between the states. The illegal practices and policies hereinafter described directly affect, restrain, and involve such commerce.

## III.

*History of Controversy*

1. Approximately in April, 1968, Plaintiff, W. H. WOOD, commenced operation of a Gulf-branded service station in the City of Midland, Midland County, Texas.

2. During the initial stages of the operation, relations appeared to be satisfactory, and under Plaintiff's direction, the business of the station progressed until it reached the volume of approximately 22-25,000 gallons of gasoline sold per month.

3. Plaintiff regularly posted his price of gasoline at approximately one cent above that being posted by other

Gulf stations in the general area. He was repeatedly told the price to post by Gulf representatives. and likewise received complaints from Gulf representatives about his practice of posting one cent higher. However, because of the strategic location of the Plaintiff's station, and the type of business it enjoyed, Plaintiff was able to. and did, maintain his volume and still post his driveway price one cent higher than other stations.

4. In addition, Plaintiff stocked other types of tires, batteries, accessories, and specialty items than those manufactured and sponsored by Gulf Oil Corporation. Plaintiff was, on occasion, requested to cease this practice, but continued despite such request.

5. For the greater portion of time that the Plaintiff was in business operating the Gulf-branded station, the price of gasoline in the Midland market stayed fairly stable. However, toward the end of the period during which the Plaintiff was operating the station, there was a temporary price war, and after the conclusion of the price war, a Gulf representative approached the Plaintiff and told him that Gulf wanted him to post the price that it told him (the Plaintiff) to post, and to put up a sign advertising such price. The Plaintiff refused, and thereafter the Gulf representatives calling upon him commenced a course of harrassment and unwarranted criticism.

6. When this course of action did not accomplish its desired purpose, Plaintiff was instructed by a representative of Gulf Oil Corporation that he would have to get down on his prices, or get out of the station.

7. During the period of time that the Plaintiff operated the Gulf station, he was on a year-to-year lease, with Gulf Oil Corporation as the lessor of the station facility.

In December, 1971, the Plaintiff was told by a representative of the Gulf Oil Corporation that if he did not drop his price on gasoline, as instructed by Gulf, his lease would not be renewed. Then, approximately a year later, the Gulf Oil Corporation representative told the Plaintiff that he "didn't know" if Plaintiff would be granted a new lease, but if he was given a lease, he would be required to pay more rent. As a result, the Plaintiff, because he could not run the business as an independent businessman, though contracts with Gulf Oil Corporation purported to recognize him as an independent businessman, the Plaintiff surrendered the station, and sold the inventory and equipment that he owned.

8. As a result of the termination of the station, the Plaintiff was forced to lose the good will value, the value of the equipment that should have been realized upon the sale, and future net profits that could and would have been realized from the continued operation of the station.

## IV.

### *Violations*

1. The Defendant employed, enacted, and carried out a price-fixing policy throughout the United States, pursuant to which policy the activities in this case were conducted, which directly resulted in damage and loss to the Plaintiff, such price-fixing policies being in violation of Section One of the Sherman Anti-trust Act.

*Count 2.* The Defendant employed, enacted, and carried out an illegal tie-in arrangement policy throughout the United States, pursuant to which policy the Plaintiff and other stations were required to carry tires, batteries,

and accessories, sponsored and/or manufactured by Gulf Oil Corporation, as a condition to being allowed to sell Gulf-branded gasoline, such policy being in violation of Section One of the Sherman Act, and Section Three of the Clayton Act.

*Count 3.* Defendant, acting in conjunction and conspiracy with other stations who adhered to policies of the Defendant, carried out and effectuated an illegal and unreasonable restraint of trade in violation of Section One of the Sherman Antitrust Act.

*Count 4.* Defendant was guilty of illegal monopolization or an attempt to monopolize in violation of Section Two of the Sherman Act.

*Count 5.* The Defendant discriminated in prices at which the gasoline was sold to the Plaintiff, and to other buyers of like quality and quantities of gasoline in violation of the Robinson-Patman Act.

## V.

## *DAMAGES*

As a direct and proximate result of the actions of Defendant Gulf Oil Corporation, acting pursuant to its illegal policies and procedures, and acting in concert and conjunction with those dealers adhering to such policies the Plaintiff was caused to lose at least One Hundred Thousand Dollars ($100,000.00) actual damages for recovery of which the Plaintiff brings this suit.

## VI.

## *RELIEF SOUGHT*

Plaintiff prays that citation duly issue commanding the Defendant to appear and answer herein, and that upon

final hearing Plaintiff have judgment against the Defendant in the total sum of One Hundred Thousand Dollars ($100,000.00) for violations of the Sherman Antitrust Act and Texas Antitrust Laws, and the amount recovered for violations of the Sherman Antitrust Act be trebled in accordance with law, that the Court issue an injunction restraining further violations by the Defendant, that the court set and award the attorneys prosecuting this action a reasonable attorney's fee in accordance with law, that interest be assessed on all amounts awarded from the date of judgment, and that the Plaintiff have such other and further relief, general or special, at law or in equity, to which he may be justly entitled.

Respectfully submitted,

Allen Moore
204 W. 5th Street
Odessa, Texas 79760
Phone: (915) 332-1393

Charles M. McDonald
Alico Center
Waco, Texas

Jack N. Price
Price, Fisher, Hill, Patton
& McLemore
405 East Magrill Street
Longview, Texas 75601

By /s/ JACK N. PRICE
*Attorneys for Plaintiff.*

PLAINTIFF DEMANDS TRIAL BY JURY

## APPENDIX E

IN THE

# United States District Court

FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

---

CIVIL ACTION NO. P-72-CA-40

---

W. H. WOOD,

v.

GULF OIL CORPORATION

---

## AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT OF GULF OIL CORPORATION

BEFORE ME, the undersigned authority, personally appeared James L. Barrett, who, after being duly sworn by me, did upon his oath depose and say:

"My name is James L. Barrett, and I have been employed in the Marketing Department of Gulf Oil Corporation for the past 12 years. From about the middle of 1967 until July 15, 1973, I held the position of Retail Marketer. From about the middle of 1967 to March, 1969, and from May 1971 until July 15, 1973, I was responsible for servicing Gulf service station dealers in Midland, Texas.

"During the latter part of January, 1972, or possibly the first few days in February, 1972, W. H. Wood told me he was tired of listening to customer complaints and trying to get help for his service station at 501 W. Wall and Marienfeld, Midland, Texas, and that he wanted out of the station if he could sell out to his brother, Kenneth Wood. I told W. H. Wood that Kenneth Wood would have to be approved before I could agree to his request. Attached is a true copy of Kenneth Wood's application, dated February 7, 1972, for a lease on the station operated by W. H. Wood. This application was subsequently approved, and Kenneth Wood entered into a lease with Gulf on the premises effective April 1, 1972."

/s/ JAMES L. BARRETT
James L. Barrett

SWORN TO AND SUBSCRIBED BEFORE ME the 15th day of November, 1973.

/s/ MARY J. CARY
Notary Public in and for
Harris County, Texas

## APPENDIX F

DATE 2/7/72 — PROPOSED FOR DEALER — [X] AGA [ ] OPEN CREDIT [ ] LOAN REQUEST ATTACHED

FULL NAME KENNETH DEAN WOOD — AGE 35 — PRESENT OCCUPATION CREDIT MANAGER DISPATCH-TELEGRAM — SPOUSE'S NAME CARLINA

STATION NUMBER & STREET ADDRESS DEALERTOWN GULF 301 W WALL MIDLAND TEXAS — MAILING ADDRESS SAME — HOME PHONE 694-2480

CITY MIDLAND — COUNTY MIDLAND — STATE TEXAS — SOCIAL SECURITY NUMBER 465-56-0033

OTHER BUSINESS CONNECTIONS NONE

SUITS OR JUDGMENTS EXPLAIN [ ] — BANKRUPTCY [ ] — GUARANTOR FOR ANOTHER'S DEBT [ ]

APPLICANT'S HOME ADDRESS 3414 STOREY — [X] OWNS [ ] RENTS — HOW LONG HERE 6 YRS

CITY MIDLAND — COUNTY MIDLAND — STATE TEXAS 79701

PREVIOUS HOME ADDRESS 3117 ASSLER — CITY MIDLAND — STATE TEXAS

IF YOU HAVE SERVICE STATION EXPERIENCE, SHOW NAME OF PETROLEUM SUPPLIER AND STATION LOCATION ADDRESS.
TEXACO 400 W WALL MIDLAND, TEXAS

| | | | |
|---|---|---|---|
| NEAREST RELATIVE W O Wood | RELATIONSHIP FATHER | ADDRESS 607 W MARLIN MIDLAND TEXAS | |
| PRESENT EMPLOYER MIDLAND REPORTER-TELEGRAM | EMPLOYER'S ADDRESS 201 E ILLINOIS MIDLAND, TEXAS | | TIME EMPLOYED 4 YRS |
| PREVIOUS EMPLOYER INTERSTATE STANDARD | PREVIOUS EMPLOYER'S ADDRESS 400 W WALL MIDLAND TEXAS | | TIME EMPLOYED 8 MO'S |
| SPOUSE'S EMPLOYER WESTERN SERVICE | SPOUSE'S EMPLOYER'S ADDRESS 305 N MINEHEER MIDLAND TEXAS | | TIME EMPLOYED 17 YRS |

BANK ACCOUNT [ ] LOAN [ ] SAVINGS — PERSONAL REFERENCE (NAME AND ADDRESS) C H WYATT - 3421 STOREY, MIDLAND, TEXAS — GULF TRAVEL CARD NUMBER NONE

BANK NAME FIRST NATIONAL BANK — BANK ADDRESS MIDLAND, TEXAS

CREDIT ACCOUNTS SEARS, ROEBUCK & CO — ADDRESS MIDLAND TEXAS

CREDIT ACCOUNTS SALES TAXLEY — ADDRESS MIDLAND TEXAS

NEW BUSINESS LOAN ARRANGED WITH FIRST NATIONAL BANK — AMOUNT — — TERM —

INTEREST % — PAYMENTS — SECURITY

MONTHLY VOLUME [ ] ESTIMATED [ ] ACTUAL 2,300 — SETTLEMENTS 2 TIMES WEEKLY — DUE DAYS (CIRCLE) M T W T F S — [ ] MAIL IN [ ] PICK UP — [ ] DEALER'S CHECKS [ ] CURRENCY ONLY

MINIMUM CASH DEPOSIT REQUIRED 200.00 — CASH DEPOSIT RECEIVED — DEPOSIT COLLECTION RATE ¢ PER GALLON

OPEN CREDIT MONEY

| FOR | TERMS |
|---|---|
| Gasoline | $ |
| Lube Oil | $ |
| T B A | $ |

NOTE: Terms on Gasoline to DEALERS are basically C.O.D. If credit for Gasoline is required, explain circumstances fully.

| Guarantor | Age | Relationship to Dealer |
|---|---|---|
| | | |

Address

Approved R E Myer — Date 2/25/72 — Sales Representative — Credit Investigation

APPLICATION

Mr. [illegible] for selling the Texaco station over because the [illegible] space that it made for his people, there was not enough room for [illegible] the business to expand. I was offered a good price by the [illegible] and took the [illegible] Gulf [illegible]. I believe this

# PERSONAL FINANCIAL STATEMENT

GULF DEALER APPLICATION

As Of [illegible] 7 19 72

| ASSETS (What You Own) | | LIABILITIES (What You Own) | |
|---|---|---|---|
| CKING ACCOUNTS | UNIT COSTS | UNSECURED NOTES PAYABLE (WHO - ADDRESS) | UNIT COSTS |
| [illegible] | $ | | |
| [illegible] | 5000 | (1) NONE | $ -0- |
| INGS ACCOUNTS | | | |
| [illegible] | 2100 | CONTRACTS & SECURED LOANS PAYABLE TO / WHAT GOODS | |
| | — | (1) NONE | -0- |
| NOTES (CURRENT MARKET) | | (2) | |
| [illegible] | 2850 | (3) | |
| [illegible] | 2650 | OPEN ACCOUNTS PAYABLE TO / ADDRESS OR BRANCH | |
| INSURANCE FACE AMOUNT $ 30,000 | XXXXXX | (1) NONE | -0- |
| SH SURRENDER VALUE | 2,000 | (2) | |
| S RECEIVABLE (WHO) | | (3) | |
| [illegible] | 500 | (4) | |
| S (1) MAKE CHEVROLET YEAR 1967 | 1,200 | (5) | |
| | | (6) | |
| NS (1) MAKE FORD TYPE TON YEAR 1970 | 3000 | (7) | |
| 1 Lot, Wright - | | (8) | |
| S & EQUIPMENT (DESCRIBE) | | REAL ESTATE INDEBTEDNESS TO / WHAT PROPERTY | |
| Assorted Hand Tools | 100 | (1) [illegible] 344 Street | 13,350 |
| | | (2) | |
| ESTATE & HOME DESCRIPTION / LOCATION | | (3) | |
| 3 BR. Brick Split 344 Street | 14500 | UNPAID TAXES (TO & KIND) | NONE -0- |
| | | (2) | |
| | | OTHER LIABILITIES (DESCRIBE) | NOTE -0- |
| HOLD GOODS, PERSONAL & FAMILY GOODS | 8,000 | (2) | |
| R ASSETS (1) Wife's Profit-Sharing | | (3) | |
| (Est Purchase 1-73) Annuity | 4500 | TOTAL LIABILITIES | $ 13,350 |
| | | NET WORTH | 39,450 |
| AL ASSETS | $ 43,800 | TOTAL LIABILITIES AND NET WORTH | $ 43,800 |

| MONTHLY INCOME | | MONTHLY EXPENDITURES | |
|---|---|---|---|
| RY, PRESENT JOB | $ 720 | PAYMENTS ON NOTES, CONTRACTS & SECURED LOANS | $ -0- |
| 'S SALARY | 575 | REAL ESTATE PAYMENTS, NOT INCL. HOME | -0- |
| ERITIES, INCOME & RENTALS | | RENT OR HOUSE PAYMENTS (Gas, Groceries, Utilities, Car, Insurance, Etc.) | 110.00 |
| R (DESCRIBE) | | OPEN BILLS & HOUSEHOLD PURCHASES | 335.00 |
| | | OTHER (TAXES, ETC.) | -0- |
| AL INCOME | $ 1295 | TOTAL EXPENDITURES | $ 445.00 |
| TOTAL EXPENDITURES | 945 | | |
| INGS | $ 350 | | |

I hereby make application in my behalf as a dealer for Gulf Oil Co.-U.S.
I certify that the above information is true and correct.

Kenneth A. Ward Date 7/19/72

Upon the mail Contract my Personal Signature Under it Can Accepted as valid Terms

MAR 3 19
MICHAEL RODAK, JR.

No. 74-840

In the
# Supreme Court of the United States
October Term

GULF OIL CORPORATION,
*Petitioner,*

*v.*

W. H. WOOD,
*Respondent.*

**Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

MR. JACK N. PRICE,
PRICE, FISHER, PATTON & MCLEMORE,
P. O. Box 511,
Longview, Texas 75601,

MR. ALLEN MOORE,
520 N. Lee,
Odessa, Texas 79760,

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Waco, Texas 76701,
*Attorneys for Respondent.*

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No.

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*Petitioner,*

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**Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## PRELIMINARY STATEMENT

Respondent, W. H. Wood, a former Gulf-branded "independent" station dealer, brought suit against Gulf Oil Corporation alleging certain violations of the antitrust laws, including price-fixing, tie-ins, etc. Respondent complained that because he did not satisfactorily comply with the alleged illegal policies and requirements of the Petitioner he was caused to terminate the operation of his service station. At the time the case was set for trial in Pecos, Texas, Honorable Ernest Guinn invited the Petitioner to file a motion for summary judgment so that certain questions could be resolved by the Court of Appeals, pursuant to 28 U.S.C. Sec. 1292(b). After the motion was filed, the Court granted Petitioner a partial summary judgment, on which the appeal

was predicated. Specifically, the trial court's holdings were:

(1) that the Respondent had no right of recovery for the loss of future net profits, loss of good will, or loss in value of equipment sold by Respondent.

(2) that the Respondent may not introduce evidence regarding Petitioner's actions with respect to other Gulf dealers.

(3) that the jury should be instructed that damages found by the jury would be trebled.

These holdings were reversed by the Court of Appeals.

In "Questions Presented," the Petitioner has taken trial court holding (1) and divided it into two questions for purposes of this petition, eliminated any reference to holding (2), and included holding (3). These will be answered in order.

## REASONS FOR REFUSING THE WRIT

1. ***The Court of Appeals correctly held that the Respondent has a right of recovery for the loss of future net profits, loss of good will, or loss in value of equipment sold by Respondent.***

The first inquiry is: Do the pleadings, depositions, affidavits, interrogatories and answers, and requests for admissions and answers, on file, raise a fact issue as to whether the conduct of the Petitioner Gulf Oil Corporation was a "proximate cause" (and there may be more than one proximate cause) or a substantial, identifiable cause of the termination of the Respondent as a Gulf station dealer?

The answer is found primarily in the deposition of Mr. W. H. Wood, the Respondent, taken by the Petitioner, Gulf Oil Corporation.

Mr. Wood testified that he had been in the service station business approximately eight years. (Wood Dep. 4) In April 1968, he bought out the Gulf dealer operating the Gulf station at 300 West Wall Street, in the downtown area of Midland, Texas. (Wood Dep. 7)

Mr. Wood encountered no difficulties until Mr. Malmberg (C. B. Malmberg, District Marketing Manager for Gulf Oil Corporation, Lubbock, Texas) took over the district. (Wood Dep. 10) Thereafter, difficulties commenced concerning his practice of posting the driveway price a penny higher than Gulf desired. The Gulf sales representative calling upon Mr. Wood at the time Mr. Malmberg became the District Manager was Mr. Jim Wolford. About Mr. Wolford, Mr. Wood said (page 11, Wood Dep.):

> "Q. All right, so we'll take up after the first three years. Now who was your sales representative then?
>
> A. It was Jim Wolford, he was about — I think he left about June — so for the first six months. And then Jim Barret was for the remaining six months.
>
> Q. Now tell me about the difficulties you had with Mr. Wolford after this first three year period.
>
> A. Well, it was just little things, you know, like the price of my gasoline. I was posting a penny higher, and Gulf was asking me to get my price down a penny.
>
> Q. What did Mr. Wolford say to you about the price of your gasoline?
>
> A. Well, I can't recall the exact conversation, because it was so long ago, but I mean he left no doubt that Gulf wished me — or were wanting me to drop the price of gasoline one cent."

Mr. Wood had more difficulty with Mr. Early Foster, the Gulf "TBA" representative, commencing January 1971 (contemporaneous with Malmberg's arrival on the scene.) Wood Dep. 18) With regard to Mr. Foster, Mr. Wood testified (commencing page 19, line 12, Wood Deposition:

> "Q. All right, sir, now tell me about the first time you had trouble with Mr. Early Foster?
>
> A. Well, I was buying TBA, my filters, from Audley, and he got killed and his wife was—
>
> REPORTER: Who?

A. Audley Downs, he was a distributor, and he was giving me fifteen percent off of suggested — I mean off his price, case lots, and he got killed and his wife was just maintaining the business until she could get out. So I started buying from a parts supply, at the same price that Audley and John Griffen, which is the distributor now, was having to pay for their filters, jobber price.

And Early didn't like that, he thought I should be buying from Gulf. So he came to the station one day, him and John Griffen, and wanted to know if we could go get a cup of coffee. So we was over having a cup of coffee, and he was asking me why I didn't buy them from Gulf or from John, and I told him it would cost me too much money, I was saving about thirty cents a filter.

And he kept on and on, and finally he asked me if I would buy them from Gulf or John Griffen if John would lower the price. Well, I said, yeah, I'll buy them from them, if I can buy them at the same price, I'll buy them through John Griffen.

And he started in on John Griffen then to lower his price to me, so that I could buy filters through Gulf. And John finally agreed to lower them down, I think it average out within about seven cents a filter of what I was paying for them, from this supply house.

And in the course of the conversation — I don't know how it all came up now, it's been so long ago, but anyway Early Foster, when we was coming back to the station, and I was still talking about the filters and everything, and Early Foster said Mr. Malmberg said either you would buy them or you would get out, you would either buy them through Gulf or you would get out of the station, and we'll get somebody that will.

And I asked Early Foster, I said, ' Is that a threat?' And he said, 'No, that's a statement,' And I asked him to put it in writing, and he said, 'I won't do it.' So we

went on in the station then, and then he made the statemen again in front of the mechanic over there.

Q. What is the mechanic's name?

A. Dale Norton.

Q. Dale Norton?

A. Yes, sir.

Q. Where does he live?

A. 402 Sprayberry, I think that is his address.

Q. 402 Sprayberry?

A. Yes, sir.

Q. S-p-r-a-y-b-e-r-r-y?

A. Yes.

Q. And that's in Midland?

A. Yes, sir.

Q. And what was his name again?

A. Dale Norton.

Q. And he made the statement in front of this mechanic their either you would buy Gulf TBA or you would be out of the station, is that what he —

A. Yes, sir, he made it in front of John Griffin over at the Downtowner, that I would either buy it or get out."

Gulf's attorney inquired as to whether Mr. Wood talked to Mr. Malmberg about this, and the following testimony was given (Wood Dep. 22):

"Q. Did you talk to Mr. Malmberg about it?

A. No, sir, Mr. Malmberg wasn't there.

Q. I mean you didn't call him on the telephone or write him a letter and ask him if he said such and such a thing?

A. I didn't care what he said.

Q. Well, you knew Early Foster didn't have the authority to either put you in or take you out of the station, didn't you?

A. I didn't know what authority Early Foster had. He worked for Gulf, he was an employee of Gulf.

Q. Well, you knew he was a TBA representative, didn't you?

A. Yeah, he was a TBA representative.

Q. And you knew that —

A. And if he told me that Mr. Malmberg said I would either buy them or get out, I took it for exactly what he said.

Q. All right, and what did you do about it, anything?

A. I started buying filters from Gulf."

Mr. Wood did, however, have occasion to talk to Mr. Malmberg. At page 25 of his deposition, Mr. Wood testified in response to questions by the Gulf attorney:

"Q. All right, sir. Did you have any conversations or visit with Mr. Malmberg?

A. Yes, sir.

Q. When was the first one?

A. The first one was late afternoon, oh in — well, I'm going to say it was late January or middle of February, or something, when he first came here, he came in by himself one afternoon and introduced himself, and spoke a few minutes and left. I believe he was on his way to Lubbock.

Q. Did he talk about anything, about your prices or TBA or anything?

A. Not at that time, it was just a more or less — well, we were busy, it was the five o'clock rush, and he just introduced himself as to who he was, and that was about it.

Q. When is the next time you saw Mr. Malmberg?

A. It was about a month later when him and John Griffen and Mr. Myers came in.

Q. What took place then?

A. Well, they came in, and I was back in the office back there doing something, I don't recall what I was doing, but anyway they came back there, and Mr. Malmberg looked up there and saw those Goodyear tires, and he said 'I won't be satisfied until them Goodyear tires are out of this station.'

Q. How did you take that?

A. Well, I took it as a threat.

Q. As a threat?

A. Yes, sir, a threat.

Q. Well, what did he threaten you?

A. Well, he's is the man that was in charge of Gulf, as far as I'm concerned, and if he told me he wasn't going to be satisfied with the way I run my business, I couldn't run my business the way I wanted to, I couldn't satisfy him, I took it was a threat.

Q. You took it as a threat when he said he wouldn't be satisfied until those Goodyear tires are out?

A. Yes, sir.

Q. That's the only basis you have for thinking it was a threat?

A. Yes, sir.

Q. Just his statement?

A. Right.

Q. Did he tell you you had to get them out of there?

A. No, I told you what he said.

Q. That's the only thing he said? he didn't threaten—

A. About the tires.

Q. He didn't threateen you or he didn't tell you that you had to get them out?

A. He just made the statement, 'I won't be satisfied until these tires are out of this station.'

Q. Did you say anything to that?

A. No, sir.

Q. Not a word?

A. No, sir.

Q. You just let it drop?

A. I let it drop right there.

Q. All right, did you get rid of the Goodyear tires?

A. Yes, sir."

During this same visit, Mr. Meyers, Mr. Malmberg's assistant, "kept asking" Mr. Wood why he didn't drop the price of gasoline. (Wood Dep. 28) Mr. Wood testified that he didn't feel that he could operate his business on the margin which would result had he done so, which would have been approximately three and one-half cents per gallon. (Wood Dep. 30).

Mr. Wood also was told to change his pricing by Mr. Jim Barrett, sales representative who replaced Mr. Jim Wolford (who stayed only a short time after Mr. Malmberg arrived). Mr. Wood testified, (Dep. page 37):

"Q. Did Gulf's representatives coming out and talking to you about prices that you were posting out there, the prices you were selling gasoline for, did that conver-

sation cause you to lose any volume, or any money, or those conversations rather?

A. Yes, sir, I feel like it did.

Q. All right, you tell me now how it cost you some money?

A. Well, when they just kept on and on — Jim Barrett kept on and on asking me to drop the price, and he kept saying, 'Well, they may not renew your lease, or they may even cancel your lease,' I finally consented to drop my price a penny a gallon, and it did not increase my volume.

Q. Oh, it didn't?

A. No, sir.

Q. Well, tell me how it cost you money.

A. Well, it was a penny a gallon profit, on the — say 18,000, if I pumped 18,000 that month, it would cost me a hundred and eighty dollars.

Q. Well, did you have a sign up there advertising your prices?

A. Yes, sir. That was one of Mr. Malmberg's pet peeves, was that everybody get their price in line and post it on the sidewalk.'

Mr. Wood stated that although he finally acceded to the demands of Gulf and lowered his prices, he did not pick up any volume, and he did not think that the penny differential had anything to do with it whatsoever in the first place. (Wood Dep. 38) He stated that he could charge a penny over what other people were charging and maintain his volume because he had many coming in and filling up and leaving their car at the station, and he accommodated them and gave them service. Therefore, the reduction in his price was only by virtue of the insistence, and

threats, of the Gulf representatives. As Mr. Wood testified, (Dep. 39-40):

"Q. All right, when did you finally agree to lower your price down?

A. When Jim Barrett kept hounding me and threatening me, and force the lease cancellation.

Q. Now wait a minute, you say he threatened you with forced lease cancellation?

A. Yes, sir.

Q. What did he say?

A. He told me that Gulf may not renew my lease and —

Q. Oh, may not renew your lease?

A. — or may even cancel my lease.

Q. He said 'may cancel your lease'?

A. Yes, sir."

The harassment from Barrett forced Mr. Wood into asking that a buyer be obtained for the station, according to testimony appearing at page 45-46:

"Q. All right, sir, so you say that coming out there and the words you used was 'hounding you', you said that —

A. Pardon?

Q. You said that Mr. Barrett 'hounded' you to lower your price?

A. He kept after me and kept after me every few days, and he would come by and see me, saying 'Get your price down', 'Get your price down'. And the last time he came in, I told him, I said, 'Jim, I ain't going to do it, I don't feel like it's necessary with this station. I've had it for three and a half years, and all this time, I've been a penny a gallon above, and by dropping

the price a penny a gallon is not going to increase my volume that much. I just don't believe it will help.' He felt like I didn't know how to run my own business.

Q. Did you decide to give it a try to see?

A. Yeah, after he forced — after he said they might not renew my lease, I did.

Q. Mr. Barrett said they may not renew your lease?

A. He said they may cancel my lease, may not renew it, and may cancel it, if I don't get the price down —

Q. Those are the words he used?

A. Right.

Q. May not renew it and may cancel your lease if you don't get your price down, is that right?

A. It made me mad and I told him to get me a buyer."

However, Mr. Wood immediately reconsidered, according to the following testimony, Dep. p. 49:

"Q. All right, now that's the first time that you ever told any Gulf representative that you were thinking about getting out?

A. Correct.

Q. The *first* time, very first time?

A. And then I reconsidered, I mean I didn't want to get rid of the station, so I said, 'I'll tell you what I'll do, if you will let me go off of twenty-four hours, then I'll drop the price a penny a gallon to get along with Gulf.' "

After this incident, Mr. Wood testified that Gulf, acting through Malmberg and Barrett, came out with a "dish promotion". Mr. Wood stated that he did not want to go along with the dish promotion because it was too expensive on the dealer's part, and that Barrett repeatedly asked

him to take it on. (Wood Dep. 50) Even after he decided to sell, Mr. Barrett tried to get him to take the dish promotion. (Wood Dep. 51)

Sometime in February 1972, Mr. Wood asked Barrett if his lease was going to be renewed (it was scheduled to expire March 31, 1972) and Barrett replied that he did not know but that if the lease was renewed Gulf was going to go up on Mr. Wood's rent "about $175 a month". (Wood Dep. 52) It was after this that Mr. Wood decided that he would sell.

With regard to the harassment that led to the decision to sell, Mr. Wood gave the following testimony commencing at page 59 of his deposition:

> "A. No, sir, I asked for it. The harrassment took place after Mr. Malmberg came to this district; there was no harrassment prior to that with Gulf in any form or fashion.
>
> Q. Did you ever talk to Mr. Malmberg about this harrassment?
>
> A. No, sir.
>
> Q. You never even complained to him about it?
>
> A. I didn't figure my — why should I go complain to him?
>
> Q. Well, did you think that he was responsible for this harrassment?
>
> A. Yes, sir, I did.
>
> Q. And normally if you think somebody is responsible for —
>
> A. But did he think I had enough sense to run my business the way I thought it was best for me.
>
> Q. Just a second, Mr. Wood. Did you think that if somebody was directing harrassment at you should you

talk to them about it, shouldn't you talk to somebady that was —

A. The harrassment always come through the sales rep. It wasn't Mr. Malmberg himself harrassing me, it was always the sales rep, what Mr. Malmberg said, do this, and Mr. Malmberg said do that, don't do this, do that.

Q. You never checked with Mr. Malmberg —

A. That was —

Q. — Excuse me, go ahead.

A. — who was harrassing me, was through the sales rep carrying out his orders, or supposed orders.

Q. And you never did check with Mr. Malmberg to see if he had actually told these sales reps to say these things to you?

A. No, I knew Jim for four years and I figured if he — that he wouldn't have lied to me about something, if he told me, then that's the way it was. He had never lied to me before.

A. So the reason you got out of the station, you just didn't figure that you could run this thing as an independent business man, is that correct?

A. That's one of the reason, and I didn't feel like I was in a position to gamble on them renewing my lease or not renewing my lease, because if they hadn't of renewed my lease, I couldn't have sold my equipment for no where near what I had in it, and I wasn't in no position to take that gamble, or to take that chance."

Mr. Wood testified that the station was a profitable operation in which he made anywhere from $6,000 to $10,000 a year as "station profit" and that the business was such that he did not want to give it up and would have stayed

if he had had any assurance that Gulf would have renewed the lease. As Mr. Wood testified, beginning page 65 of his deposition:

> "Q. And if he had charged a hundred and seventy-five dollars a month more, that still would not have even equalled what you were collecting from the parking?
>
> A. If I knew that Gulf would have renewed my lease I would have went ahead and stayed and paid the hundred and seventy-five dollars a month extra, because the station would have still been worth it."

Therefore, Mr. Wood testified that he made every reasonable effort to try to find out whether his lease would be renewed. (Wood Dep. 65):

> "Q. Well, did you ever try to find out from Mr. Barret after the conversation—
>
> A. Yes, sir, I did.
>
> Q. —you had with him whether they were going to renew it or not?
>
> A. Yes, sir.
>
> Q. How many times did you ask him?
>
> A. I would ask him nearly every time he would come around, and he never would give me a definite answer.
>
> Q. All right, now when was the last time you talked to him about it?
>
> A. It was sometime in February there when I asked him and he told me he didn't know. And I thought, 'well, here it is a little over a month before my lease is to be renewed, and if he don't know, it don't look too dadgummed good."

Mr. Wood's "feeling of insecurity" was added to by the fact that the year before, i.e., in April, 1971, when his lease was renewed, his request for a three to five-year lease was turned down by Gulf, although it had been promised by Jim

Wolford, the former Gulf sales representative. (Wood Dep. 66) In this regard, the following testimony is given at pages 67-68 of Mr. Wood's deposition:

"Q. Well, just a minute, I'm talking about the fact that they didn't give you a three to five year lease, how did that affect your profits?

A. Because I'm not there now and if I had of had a five year lease, I would have been.

Q. Well, did Gulf tell you to get out?

A. No. They didn't give the five year lease though.

Q. No, but did they tell you to get out of the station?

A. No, they didn't tell me to get out. They just made it pretty obvious that I felt like that was what was going to happen, I was going to get thrown out.

Q. Oh, you felt like it, but nobody at Gulf ever told you that they were not going to renew your lease?

A. Not in so many words, they just always said, 'We may not renew your lease,' or 'you may get your lease cancelled.' They never said, 'We are not going to renew your lease.'

Q. So on the basis of that, the fact that they told you that we may or may not renew your lease, and if we do, we are going to raise your rent a hundred and seventy-five dollars, you decided it was time to get out?

A. I decided I wasn't in no position to ride them out."

Mr. Wood's exasperation is summed up when he states, page 70 of his deposition, "That I was tired of fighting Gulf, is the reason I got out." He said that Mr. Barrett was around every week or ten days, wanting him to drop the price of his gasoline (Dep. 70) and after he did so, and found that it didn't increase his volume but simply cost him a substantial part of his profit, he told Mr. Barrett, "Jim, I sure appreciate that good advice about dropping the price of

gasoline," and when Mr. Barrett inquired, "How is that?", Mr. Wood stated, "Well, it just cost me about $200 a month profit", to which Mr. Barrett replied, "Yeah, but at least you didn't get your lease cancelled, did you?"

Sometime in February, according to Mr. Wood, while the dish promotion and the other problems were being discussed, Jim Barrett made the statement to him: "Well, if you don't like it, get out." (Dep. 78-79) Also, Mr. John Griffin, the TBA jobber, reported to him that Meyers, Mr. Malmberg's assistant, had stated that Mr. Wood's taking the TCA but not dropping his price was "just like stealing from Gulf". (Wood Dep. 79)

With regard to the request for a five-year lease, Mr. Wood testified that when he requested it Mr. Meyers, Mr. Malmberg's assistant, told Jim Barrett, and Barrett told Wood, that a five-year lease "was only for deserving dealers." Mr. Wood figured that he had been with Gulf going on four years and that if he wasn't a "deserving dealer", "What did it take to be a deserving dealer?" (Wood Dep. 82)

Mr. Wood made it clear that had it not been for these problems with Gulf, he had no intention of leaving the station Wood Dep. 86-87):

> "A. Well, I figured if I made a profit of six thousand or ten thousand a year — I had no intentions of leaving that station as long as me and Gulf could work together, I would probably have stayed there for — I don't know how old you are — but I would probably have stayed just as long as — I just had no intention of leaving. Subsequently —
>
> Q. How long did you plan to stay there?
>
> A. Just as long as I was able to do the work, do the job.
>
> Q. And that's assuming that Gulf would have continued to lease the station to you?
>
> A. Correct."

In this same vein, Mr. Wood testified (Wood Dep. 88-89):

"Q. And that's what you are suing Gulf for, for all these things you say that Gulf said and did to you?

A. That's right.

Q. You just couldn't continue to operate under these intolerable conditions?

A. It got to where I wasn't operating it, that Gulf was operating it.

Q. Well, now did Gulf set the price out there on your products?

A. It wound up that way.

Q. Well, who put the price out there?

A. Well, I put the price out there, I mean I was the one who went out there and changed the pump. Is that what you mean?

Q. Yes.

A. I changed the pump, but it wasn't because I wanted to."

The Gulf attorney declined to leave this line of questioning, and it led into the following which typifies the relationship between Gulf and the dealer (Wood Dep. 90-93):

"Q. So then you were the one who decided to lower the price a penny?

A. No, sir, I wasn't the one who decided to, that was an alternative; if it had been up to me, I would have left the price of gasoline alone, if I had been able to do what I wanted to.

Q. Well, you had a — still had a lease on the station?

A. Yeah, for three months.

Q. For three more months?

A. Right, up until March 31.

Q. And as far as you knew, there was no reason why they wouldn't renew your lease again?

A. As far as I knew, I didn't think they would renew my lease again.

Q. Did you ever talk to Mr. Malmberg about that?

A. Mr. Malmberg wasn't here, he was in Lubbock.

Q. Well, didn't you write him a letter or did you call him on the telephone?

A. Well, I thought Jim Barrett represented Gulf Oil Company just as much as Mr. Malmberg did.

Q. Well, you knew that Mr. Malmberg was over Mr. Barrett didn't you?

A. Well, if Mr. Malmberg was over Mr. Barrett, then therefore Mr. Barrett ought to be just as responsible as Mr. Malmberg.

Q. Don't you think that you ought to be talking to the head man sometime to try to find out exactly what is going on?

A. What is the sale rep's job?

Q. Well, would you answer my question.

A. He's a go-between between the company and the dealer.

Q. All right, sir, but now had you ever talked to a district manager before about anything?

A. Only when he came to my station. Now Mr. Marwood I did. You could talk to him all day long about anything.

Q. Well, did you ever try to talk to Mr. Malmberg?

A. No, sir, because the only time he ever come in the station he complained about he didn't like my Goodyear tires, he didn't like my oil. He didn't like those Winn products setting out there on the shelf; he said Gulf had the same line.

Q. Well, wasn't he trying to sell you Gulf products?

A. Yeah, he was probably trying to sell me Gulf products.

Q. Well, there wasn't any doubt in your mind that he was trying to sell you Gulf products?

A. What?

Q. There wasn't any doubt in your mind that he was trying to sell you Gulf products, was there?

A. He was trying to tell me I couldn't sell Goodyear tires, is what he was trying to tell me.

Q. He didn't tell you that, did he?

A. Yes, he did, in so many words.

Q. Well, now wait a minute, did he tell you that you couldn't sell Goodyear tires *a not?*

A. In those words?

Q. That's what I'm asking you, you told —

A. He told me he would not be happy until those Goodyear tires was out of the station.

Q. All right, he told you he wouldn't be happy until they were out of the station, he didn't tell you you couldn't sell them?

A. And Gulf tires were in there.

Q. He didn't tell you you couldn't sell Goodyear tires, did he?

A. Well, if I sold Goodyear tires he wasn't going to be happy, and if he wasn't going to be happy, I wasn't going to be there.

Q. How do you know that?

A. Well, that's plain arithmetic.

Q. What do you mean plain arithmetic?

A. It don't take a very smart man to figure that out.

Q. Well, now you are just speculating —

A. No, I'm not speculating, because they had hung that lease over my head too many times.

Q. Well, now how many times did they hang the lease over your head, Mr. Wood?

A. In the number of times in the last six months, I don't know, but it was more than two or three times, I mean there was several times the lease subject was brought up, that it may not be renewed or it may be cancelled.

Q. It may not be renewed or it may be cancelled?

A. Right.

Q. That's the words he used?

A. That's the words he used.

Q. And from that you decided that you could no longer continue —

A. From that I decided I had no choice."

It appears rather obvious from the testimony of Mr. Wood that, as he stated, Gulf made it clear to him that he had to go along with the price-fixing, get rid of competitive products, etc., or lose his lease. Because he had violated the policies in the first place and then was slow to correct the violations, he knew his lease was in jeopardy and he repeatedly asked for assurance that it would be renewed. He received no such assurance. He clearly stated that he would have stayed in the station as long as he had assurance his lease would be continued, but that he could not afford to "ride it out" and take a chance on losing the money that he had invested in the station (by letting the lease expire and being required to vacate). He testified directly and unequivocally that Gulf's actions caused him to terminate his dealership. Clearly, a fact issue is raised by his testimony, and the jury should be allowed to sum up the "plain arithmetic" displayed by the facts.

Other evidence supports the conclusion that Mr. Wood drew, and which the jury is entitled to draw.

Mr. C. B. Malmberg, the Gulf District Manager, gave certain testimonial support to Mr. Wood's contentions. Mr. Malmberg said that he "didn't recall" saying that if Mr. Wood received TCA without dropping his price he was "stealing from Gulf" but did admit that he may have made the statement from time to time as "comment to a retail marketer that if a dealer is not utilizing it, putting it in his pocket" one might "term that as an opinion or whatever word you want to use, stealing or whatever it is, but as far as saying this dealer is stealing, no, be it Brown, or Mr. Wood, or Smith, in Midland or San Angelo or Amarillo, or wherever it is." (Malmberg Dep. 85) He further testified that he told Mr. Wood when he saw competitive merchandise in the Wood station ". . . I notice you have Goodyear tires. I'll be happy someday if we can be better salesmen and sell you Gulf tires. You are an independent businessman, but I'll be happy when I see more Gulf merchandise going through your station." (Malmberg Dep. 90) Later, he repeated that he told Mr. Wood that he would be happy when he saw Gulf tires "in there" (in the station) and "I hoped we could get rid of the Goodyear." (Malmberg Dep. 92) He also admitted that he asked Mr. Barrett to "go down and encourage dealers to show competitive prices that they are posting, by offering them price signs." (Malmberg Dep. 96) However, he denied recalling any discussion about cancelling Mr. Wood's lease. (Malmberg Dep. 99) Mr. Malmberg did admit that he had reviewed the rental records pertaining to Mr. Wood prior to the deposition, and give this testimony about them (p. 102):

> "Q. You didn't look at any other records, than the rent records?
>
> A. That's all I recall.
>
> Q. And you found no request that the rent be increased?
>
> A. I saw no rental analysis in regards to a new lease."

Mr. Malmberg then testified that generally rental increases are based on "market value" but could not state that Mr.

Wood's station facility had increased in market value, then slightly altered his position to give the following testimony: (p. 107)

> "Q. Well, if it didn't have more market value, that wouldn't be one of the things that you considered regarding Mr. Wood when you or Mr. Barrett had said his rent was going to be increased?
>
> A. It was the over-all company policy and practice to up-grade rent; and at that time we were undertaking that practice of upgrading rent.
>
> Q. Gulf was just in general raising rents every place?
>
> A. Well, it was over-all what our practice and policy — in fact I was out here — I have been out here two years, and it's up to me to review over-all what our structure is and to keep them in competition, and in keeping with operating expense and cost of doing business and making money.
>
> Q. Well, then it was all considered strictly from Gulf's standpoint?
>
> A. Well, it's our property and our privilege and our cost of doing business, Mr. Price."

Mr. Malmberg stated that all Gulf's actions with regard to Mr. Wood were in accordance with Gulf's policies. (Malmberg Dep. 128) He also stated that Mr. Wood was an above-average dealer and that they had no complaints insofar as his competency as a dealer, his cleanliness, service to customers, etc. (Malmberg Dep. 129)

Mr. Frank Marwood, who preceded Mr. Malmberg as Gulf District Manager, for the district including Midland, testified that renewals are more or less automatic, that renewal-rental rates are based on volume of gasoline sold during the year,[1] and that a sales representative would know in advance

[1] Mr. Wood's volume did not increase but stayed substantially the same during the year preceding his termination.

whether there was any problem which would affect renewals. Witness the following, Marwood Dep. 37-38:

> "Q. Right. Now, in actuality, so long as the dealer is doing a good job and the relationship is satisfactory, the renewals are more or less automatic, aren't they?
>
> A. That is correct.
>
> Q. And from that standpoint, if any problems had developed during the year, in all probability, Gulf and the dealer would both well be aware of it, wouldn't they?
>
> A. Well, there again, you're asking me to assume a lot, Jack.
>
> Q. Well, I'm just talking about under ordinary situations. They would know if they had problems with each other?
>
> A. Certainly; I think so. And what kind of problems are you talking about?
>
> Q. Any problem that might jeopardize a renewal of a lease.
>
> A. Well, the renewal of the lease, you're referring to at the rental or higher rental or lower rental?
>
> Q. Well, let's just assume it's the same rental, say that the volume stayed about the same and it was going to be renewed at the same rental. There are problems that jeopardize —
>
> A. Well, the sales representative would talk with him. If, for example, his volume had increased, you say, well, 'You assume that,' he would talk with him about the renewal before he made up the deal. Most sales representatives discuss with each dealer the renewal of the sales agreement — of the contract, because lots of times a man might decide that he was going to leave anyway and on what basis it would be."

In the ordinary procedure, Marwood testified the Gulf sales representative just delivered an automatic renewal letter

which was read to the dealer sometime around the annual lease expiration date. (Marwood Dep. 41) He also testified that Gulf invested in stations in substantial amounts (according to examples given, up to $140,000) and the rental charged the dealer "wouldn't pay for that kind of investment." (Marwood Dep. 44) According to Mr. Marwood, the real purpose in making an investment of that type by Gulf Oil Corporation is to get a good location through which to sell Guf products. (Marwood Dep. 45)

Early Foster, the Gulf TBA representative, admitted that Mr. Wood asked him why Gulf did not let the dealers alone. (Foster Dep. 26) He also admitted that he had talked to Wood about the Goodyear tires, that Wood discontinued Goodyear tires and bought Gulf tires from him (Foster) on the day that Foster visited the Wood station. (Foster Dep. 29) He stated that Mr. Wood was doing a good job on TBA. (Foster Dep. 31) He also stated that he advised Mr. Malmberg that Mr. Wood had bought the Gulf tires, (Foster Dep. 32) and he said he was acting consistent with Gulf's policies in dealing with Mr. Wood.

Jim Barrett, the Gulf sales representative, admitted talking to Wood about lowering the price of gasoline at Wood's station. (Barrett Dep. 39) He also said that he told Mr. Wood to put up the price sign if he went down on his price. (Barrett Dep. 42) He said that he was concerned with retail prices because it affects business. (Barrett Dep. 67) He also stated that he had discussed TBA with Wood, and perhaps with Malmberg. (Barrett Dep. 52) He also admitted that Mr. Wood had asked him about the lease renewal, (Barrett Dep. 42), but he did not tell Mr. Wood there was no reason not to renew the lease. (Barrett Dep. 44) He said that he made no recommendation in writing regarding Mr. Wood's lease, although he normally turns in recommendations five to six weeks ahead. (Barrett Dep. 70) He said that ordinarily renewals are not even discussed with the dealer because there is no need to, and that he had no discussions with Wood about the renewal in the previous three years that Mr. Wood had served as a dealer. (Barrett Dep. 82-84) He said that he was carrying out Gulf's policies as learned

in a Gulf school that he attended in Tulsa (Barrett Dep. 71-72-73). Mr. Barrett in effect admitted that he knew it would ruin Mr. Wood's investment in his equipment if he had not been able to pass on the equipment as part of a going business, in the following testimony, Barrett Dep. 90-91:

> "Q. Well, think about it, you take a man in Mr. Wood's position. Now he's not a big investor, yet he had ten thousand dollars of his money tied up, and that's just about his life's savings. Now you have the power to wait until the last minute, I take it, or the last day and decide not renew his lease. You've pretty well ruined that investment for him, haven't you?
>
> A. Well, I have never cancelled a lease so I can't say — can't make a statement to that effect.
>
> Q. Well, you know what kind of equipment and so forth Mr. Wood had in his station?
>
> A. Right.
>
> Q. And you know that he's not going to be able to peddle that very much separate and apart from the service station business, you know that, don't you?
>
> A. Possibly.
>
> Q. So unless he's able to pass on as part of the service station business, it's going to ruin his investment in it, isn't it?
>
> A. Possibly."

There are two provisions of the standard lease agreement between Gulf and a dealer which are worthy of note. These are discussed in "Marketing Ground Rules" of Gulf Oil Corporation which appear in the Record at page 26 attached to Answers to Interrogatories. Paragraphs (11) and (12), pages 19-20 of the Marketing Ground Rules provide:

> "(11) in the event of re-entry by Gulf after termination of the lease, Gulf has the right to 'buy or sell or store for the account of lessee, any personal property

and stock of lessee then on said premises and lessee hereby appoints lessor his agent for such purpose * * *" This right of Gulf should be exercised in recognition that we will be dealing with the property of another. If the dealer so desires, he should be permitted a reasonable time to remove his property before this right is exercised; and

(12) strictly speaking, Gulf has no legal obligations to renew an expired lease on its property. However, a refusal to renew because of the failure of the dealer to comply with programs illegal under the antitrust laws (such as resale price maintenance, exclusive dealing, tie-in-sales, etc.), can result in actionable damage to the dealer."

Thus it is clear that Gulf was well aware that if it flatly stated to Mr. Wood that his lease was cancelled, as Gulf obviously desired, "actionable damage" would be caused Mr. Wood. Therefore, Gulf chose to do indirectly what it could not do directly, i.e., to force the termination through the imminent threat of causing Mr. Wood to lose his investment in equipment, a reality which Mr. Wood could avoid only by transferring the equipment as part of a going, existing business operation, thereby preventing Gulf from re-entering and either storing or selling the equipment for him.

Other witnesses who have testified by deposition lend even further credence to Mr. Wood's testimony. The affidavit of John Griffin appears at R. 47. Mr. Griffin stated that he became distributor for Gulf TBA in July 1970. After Mr. Malmberg replaced Mr. Marwood as District Manager, the TBA representative, Early Foster, became more demanding. He stated that if Mr. Griffin did not get the job done that Gulf wanted done, Gulf would get someone who would. He stated that Mr. Griffin could be replaced "like the rest of them." Wolford, the sales representative of Gulf, told Mr. Griffin that Malmberg had been sent in to "shape up" the Midland area. Mr. Griffiin visted Wood's station in the company of Early Foster sometime during the first quarter

of 1971. Prior to this visit, Foster had expressed dissatisfaction with the fact that Wood was buying non-Gulf products. During the visit to Wood's station, Foster, Griffin and Wood went "to coffee". A heated discussion ensued during the coffee break in which Early Foster told Mr. Wood that if he (Mr. Wood) did not buy Gulf products, "we will put some one in the station who will." Wood asked if this was a threat and Foster replied, "Take it anyway you want it." After this meeting, Mr. Wood agreed to purchase filters from the TBA jobber, Mr. Griffin, although he was losing money doing so.

Barrett, the Gulf sales representative, told Griffin in connection with a TBA advertising or promotion program, that if Mr. Griffin did not want to participate, he was expendable "like all the others". Mr. Griffin states in his affidavit that he has made trips with Mr. Malmberg and Mr. Meyers and/or Mr. Barrett going around to different stations, and that he has heard Malmberg give instructions to make certain stations "get back in line," make them "get foreign oil out", and similar statements. He also heard Mr. Malmberg instruct Mr. Meyers and Mr. Barrett to make sure that the dealers got driveway price signs posted. Mr. Meyers particularly did not like any station handling "STP" (competitive oil and gas additive).

Mr. Griffin heard Mr. Malmberg say, at Mr. Wood's station, that he (Mr. Malmberg) "wouldn't be satisfied until those (Goodyear tires) were out." Mr. Griffin has also heard Mr. Malmberg make statements to the effect that dealers who take temporary competitive allowance without lowering their price as Gulf wanted them to were "stealing" from Gulf. Mr. Griffin also heard Mr. Malmberg say that there would be no trouble renting Mr. Wood's station.

Mr. Griffin and Mr. Barrett held a conversation in the latter part of 1971 in which there was speculation about whether or not Mr. Malmberg would actually "check out" Mr. Wood, i.e., terminate his lease agreement or not renew it, and thereby terminate him as a dealer, since Mr. Wood

was known to be a particularly good dealer. Mr. Barrett said that Mr. Malmberg would check Mr. Wood out even though he was a good dealer.

The affidavit of Dale Norton appears at R. 50. According to the affidavit, Mr. Dale Norton works as a mechanic at the Gulf station at Marienfeld and Wall Street, Midland, Texas, and has done so continuously since it was operated by Mr. Audley Downs, prior to the time Mr. Bill Wood commenced operating the station approximately April 1968.

Norton states in the affidavit that sometime early 1971 he heard Mr. Early Foster, Jr., the Gulf TBA representative, make a statement to Wood that he (Mr. Wood) "had to buy Gulf" products. Later, and still during the early part of '71, he heard Mr. Malmberg make certain statements on a visit to the station. According to Mr. Norton, Malmberg first looked across at the Conoco station on the other side of the street and saw an "STP" sign, and said that he did not think any major oil company station ought to be handling STP. At this time Mr. Wood's station was handling STP. Later during the same visit, Malmberg walked into the back of Wood's station and saw Goodyear tires. Malmberg stated that he would "not be satisfied" until the Goodyear tires were out of the station. He then saw some oil from manufacturers or distributors other than Gulf and made the statement, "and look at the 'foreign' oil". According to Mr. Norton, Malmberg made these statements as a command, Malmberg was upset and appeared to be very mad about it and was insistent.

Before 1971, Wood had bought certain products where he could get the best price, particularly oil filters. After the conversation with Early Foster in which Foster said Wood had to "buy Gulf", Wood commenced purchasing filters from Gulf's representatives, although they could be purchased cheaper elsewhere.

Mr. Norton further states that later during the year 1971 he overheard Jim Barrett, the sales representative for Gulf Oil Corporation, discussing Mr. Wood's lease and at the same

time discussing the price that Mr. Wood was posting on the pumps. According to Mr. Norton, Mr. Barrett told Mr. Wood that he "had to get his price down". Mr. Wood had been posting approximately one cent higher than other Gulf dealers. Mr. Barrett told Mr. Wood that this was "considered at the time of lease renewal."

Mr. Norton also heard Mr. Barrett say to Mr. Wood that Mr. Wood's lease might be cancelled.

Mr. Norton says that during the last two months before Mr. Wood left the station, approximately during the first part of 1972, he (Norton) discussed with Mr. Wood from time to time the fact that Mr. Wood had not been able to obtain assurance that his lease would be renewed, and that, as Mr. Norton had overheard Barrett say, "his lease might be terminated or cancelled." From Mr. Norton's observation, Mr. Wood became nervous and was upset because of what he was going through concerning the lease renewal. He had formerly been a cheerful person, and a hardworker dedicated to the station, but according to Mr. Norton's observation this changed considerably because of the problems he was having with Gulf.

It is apparent from the foregoing that the actions of Gulf constituted a "proximate cause" or a "substantial identifiable cause" of the termination of Mr. Wood as a dealer.

The Trial Court ruled that Mr. Wood is not entitled to recovery of any future net profits or loss in value of equipment. This is at odds with the testimony relating to the cause of the termination of the dealership. After the encounters, difficulties and threats of cancellation or nonrenewal of Mr. Wood's lease, (which extended over a period of approximately one year) Mr. Wood understandably was concerned about whether his lease would be renewed on April 1st, 1972. On numerous occasions he requested, through Mr. Barrett, that Gulf advise him whether the lease would be renewed. Gulf never gave a definite answer (Wood Dep. 65; this is not disputed by Gulf). Barrett indicated that though he did not know whether the lease would be re-

newed, if it was renewed it would be at increased rent. Wood was willing to pay increased rent, assuming it was not prohibitive, but he was never told that he would be allowed to continue even at an increased rent. Despite the fact that the leases are generally thought of as being in the "evergreen" category, i.e., automatically renewed each year as long as the dealer satisfactorily performs, Wood was never told that his lease would be renewed by Gulf (Pretrial Order — Stipulation; Wood Dep. 56).

According to the testimony of the Gulf representatives, the most important factor in considering whether to renew a lease is the performance of the dealer, i.e., his past sales volume. If a dealer's performance has been satisfactory, he could expect his lease to be renewed more or less automatically (Marwood Dep. 39). Wood was characterized as a good dealer by both Marwood and Malmberg. It was generally Gulf's policy to notify a dealer whether his lease would be renewed at least thirty days in advance of the expiration of the lease. Under Gulf policies, the dealer could assume he would be renewed if he wasn't notified within at least thirty days. And if there had been any problems affecting lease renewal both Gulf and the dealer would be aware of it (Marwood Dep. 37-38).

It is an obvious conclusion, therefore, that Mr. Barrett knew, when he was being pressured for an answer, whether Mr. Wood's lease would be renewed, but he gave Wood no assurance, one way or the other, and left him "hanging". (Barrett admitted that he never told Mr. Wood whether his lease would be renewed.) In view of the past difficulties, and in view of the illegal demands that had been made upon him (preventing him from running his business as an independent dealer) and the threats of lease cancellation, Mr. Wood was placed in an untenable position. As he testified, he had "no choice" but to attempt to sell his station before the termination date. If he had not done so, his loss on tools and equipment would have been much greater, for he would have been required to sell them separately rather than as part of the going station business. Gulf recognized this fact, and it is remarkable that, after all the discussions about lease renewal

between Wood and Gulf, when Mr. Wood advised, a short time prior to lease expiration, that he desired to sell the business and get out of the station, he was not even then told that if he chose to remain his lease would be renewed — despite the fact that he was admittedly a good and successful dealer.

Translated into terms of an issue for the jury, the question is whether the actions of Gulf designed to secure adherence to practices proscribed by the antitrust laws (price-fixing and TBA tie-in or exclusive dealing) proximately caused, or were a substantial and identifiable cause of the termination of the dealership. To frame the question in layman's terms: Was Mr. Wood harassed or coerced into surrendering or abandoning the station by actions of the Gulf representatives taken because of Mr. Wood's resistance to Gulf's demands regarding pricing and TBA sales?

Clearly, if the evidence supports an affirmative answer, Mr. Wood is entitled to recover damages for loss or destruction of business, including loss of future profits and diminished value of tangible personal property. The evidence obviously raises a fact issue on the point, and it is for a jury to determine whether Mr. Wood's termination was brought about by the actions of Gulf, or produced by other causes, or without cause.

Gulf argues, and the trial court agreed, that all possibility of a fact question is eliminated because Wood "voluntarily" sold his station before he was told by Gulf that his lease would be cancelled or woud not be renewed. This is essentially the same contention advanced by Gulf in the case of *Lehrman v. Gulf Oil Corporation*, 464 F. 2d 26 (5th Cir. 1972, cert, den.) wherein Gulf argued that Lehrman voluntarily left his station and surrendered his lease and therefore could not recover future profits. This court rejected the contention stating:

> "Gulf * * * objects to the use of future profits as a measure of Lehrman's damages because, it contends that allowing Lehrman to recover for future profits would enable a proprietor who has been the victim of a single

anti-competitive practice to walk away from his business and collect damages for future profits despite the possibility that the business might still be operated successfully.

"We do not accept Gulf's restrictive application of the principle of future profits as antitrust damages. When a practice condemned by the Sherman Act puts a small operator out of business, *we do not think it matters whether the antitrust violator directly closes down the small proprietor or whether he takes anti-competitive steps which foreseeably will result in the proprietor's demise if carried on for a sufficient amount of time.*" (Emphasis supplied.)

This Court has recognized, therefore, that a direct dealer cancellation, such as was involved in *Lessig v. Tidewater Oil Company*, 327 F. 2d 459 (9th Cir. 1964) is not necessary to bring about business termination justifying recovery of future profits, diminished value of equipment, etc. Though the facts of the *Lehrman* case and the Wood case are not exactly the same, they closely parallel. In Lehrman, because Lehrman "broke the line" on pricing, he was punished by Gulf, who took his "TCA" away, and forced him to post prices which were non-competitive to those being posted a short distance away. Lehrman was allowed to "die on the vine". Mr. Lehrman surrendered his station and sold his equipment after a period of continued unprofitable operation.

In this case, Mr. Wood went through a year of demands, threats and forced compliance. His final capitulation did not come until near the end of 1971. Because he had resisted Gulf's pressure tactics, he was extremely concerned about lease renewal, and repeatedly asked to be advised. Gulf well knew the basis for his concern, and obviously could have advised him of its intentions, but it refused to do so. Mr. Wood was threatened with loss of the value of his equipment if he had continued to expiration of the lease and was not able to sell it as part of the "going business," a fact well recognized by Gulf representatives. The economic loss to Mr. Wood was thus more imminent than the "creeping"

economic death experienced by Mr. Lehrman, but the alternatives were the same to both of them. They had "no choice" but to get out of the stations, and they were placed in their respective positions by the actions of Gulf Oil Corporation.

Certainly, in pursuing the course it took in this case, Gulf was not unmindful of the teachings of *Lessig* and *Lehrman*. Just as Gulf abandoned the "form of the consignment device after the decision in *Simpson v. Union Oil Corporation*, 377 U.S. 13 (1964)," but continued accomplishing the same end result through other devices, it now attempts to do indirectly (by actions which leave the dealer no choice but to terminate) that which it cannot do directly (by lease cancellation). A fact issue has been raised and the jury should be allowed to decide whether the actions of Gulf forced the termination of the Wood dealership, and, if so, the amount of his damages, including loss of future profits and diminished, unrecovered value of equipment.

**2. *Respondent did not receive the "fair market value" of his service station when it was sold.***

This point by Petitioner is so totally without merit, and the opinion of the lower court so conclusively demonstrates its lack of merit, that the pertinent portion of the lower opinion is quoted:

[5] We agree with the fundamental point that a plaintiff cannot recover in an anti-trust suit both the difference between the fair market value and the price received at the time of the sale, and the loss of future profits. *Albrecht v. Herald Co.*, 452 F. 2d 124 (8th Cir. 1971), mandamus denied, 405 U. S. 1063, 92 S. Ct. 1493, 31 L. Ed. 2d 810 (1972); Treble Damages, 80 Harv. L. Rev. at 1566, 1577-86 (1967). In *Albrecht*, the plaintiff was forced to sell his paper route at less than fair market value because of the defendant's anti-trust violations. The damage award fell into three categories and was similar to the request in this case:

> "(1) Plaintiff's damage prior to sale, consisting of profits lost in the operation of the business by reason of Globe-Democrats competition;
>
> "(2) The difference between the fair market value of plaintiff's business (with all of his customers in-

tact) at the time of the sale and the actual sale price received; and,

"(3) Loss of future profits following the forced sale."

*Albrecht v. Herald Co., supra*, 452 F. 2d 126.

The court there thoroughly reviewed the precedents and held item three inapplicable as unjustly allowing double recovery. The court reasoned:

> "It is our opinion that the plaintiff had received all permissible damages under items one and two, damages occasioned prior to the sale and the full market value on the sale of his route as a going concern, free of the restrictive practices. This value is figured on the basis of his reconstituted route with all 1200 customers. Fair market value would be that price a willing seller could secure from a willing buyer, and the evidence establishes $24,000 as the maximum price attainable * * * The prospect of future earnings is considered in arriving at the fair market value of a given business. Here, undoubtedly the value of the route rested not in its tangible assets of an old truck and paper wrapper (valued $600), but in the exclusive contract of distribution of a well regarded newspaper in a given area. Whatever that fair market value might be, plaintiff had received it. Capitalizing and discounting future profits is one method of figuring present value, but this does not mean that a person is entitled to present value plus future profits." *Id* at 131.

Similarly in the instant case, if there had been no disputed fact concerning whether appellant received the fair market value of his service station, then the partial summary judgment would have been properly granted. The record and briefs reflect, however, that there is grave doubt whether appellant knowingly admitted receiving a fair market value. For instance, the testimony in appellant's deposition indicates that he did not know what "good will" was, so that it is improbable that any admission of receipt of a fair market value took into consideration value for good

will.[10] Therefore on both the issue of liability and damages,[11] there are disputed issues of material fact which make summary judgment improper.

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[10] The dialogue in appellant's deposition states:

"Q. So you decided then to get out?

A. Correct.

Q. And you made a deal with your brother?

A. Right.

Q. Did your brother buy all your stock and equipment from you?

A. Yes, sir.

Q. Did he pay you a fair price for it?

A. Yes, sir.

Q. You don't have any complaint about the price you got for your stock and equipment?

A. No, sir.

Q. You realized full value for your stock and equipment?

A. Yes, sir, by selling it.

Q. By selling it?

A. Yes, sir.

Q. You didn't lose any money by selling your stock and equipment to your brother?

A. No, sir.

Q. Gulf didn't have anything to do with it, you all made the trade by yourself?

A. No, we didn't make a trade, I offered it to him at a certain price, and he accepted it, and we —

Q. Well, you made a trade, you said, 'all right, I'll sell it at this price,' and he said, 'O.K., I'll buy it from you.'?

[11] Of course in determining the fair market value, whether by capitalizing and discounting future profits or estimating loss of good will and the value of the service station equipment, the $10,000 received will necessarily have to be set off.

***3. The Court of Appeals did not err in ruling that the jury should not be instructed that damages found by the jury will be trebled.***

Until recently there has been a "dearth" of authority on this point, and the authority that existed was divided. To date, no reversible error has been found in a trial court's instruction that any awarded damages will be trebled or that attorney's fees may also be recovered; nor for the trial court's refusal to do so. It has been argued that "it is unreasonable to assume that they (the jury) will not learn of it anyway during the trial." 80 *Harvard Law Review* 1566, 1569, Note 20, (1967). Submission has been favored by Judge Wizanski and has received the imprimature of Devitt and Blackmar, *Federal Jury Practice and Instructions*, Sec. 85.28 (1970). But in *Webster Motor Car Company v. Packard Motor Car Company*, 135 F. Supp. 4 (D.D.C. 1955) Judge Holtzhoff rejected such instructions stating that there was no reason for informing the jury that whatever damages they would allow would be trebled, because this is a matter solely for the court. *Sablosky v. Paramount Film Distributing Corporation*, 137 F. Supp. 929 (E. D. Pa. 1955) is to the same effect.

More definitive reasoning began to emerge with the case of *Semke v. Enid Automobile Dealers Association*, 456 F. 2d 1361 (1972) wherein the Tenth Circuit directly held that it was error for the trial court to reveal to the jury that its award would be trebled.

The court stated, at page 1370:

> "The purpose of the trebling provision is to encourage enforcement of the antitrust laws, and the treble damage thus serves as an incentive. See *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F. 2d 891 (5th Cir. 1954). It also constitutes a penalty for violation and thus serves as a deterrence.
>
> "The consequence of advising the jury of this can only be that the jury will adjust its award accordingly. But in an antitrust case it is not for the jury to fix the

> amount of the judgment. Its function is completed once it determines the amount of *damages*. As we view it, therefore, it serves no useful function to communicate this information to the jury and it is potentially harmful and hence this action of the trial court was error."

The court then noted that if judgment were to be affirmed, the error might be considered harmless since there existed little room in the evidence under the trial court's instruction to award *any* damages. However, in view of the fact that the court remanded for limited retrial, the court considered that it must "notice the ruling so that it can be avoided on retrial."

This opinion is directly on point, and should control disposition of this issue. The principal advanced in *Semke* was reaffirmed in the case of *Standard Industries v. Mobil Oil*, 475 F. 2d 220.

It is apparent that the treble damage instruction is particularly harmful where the damages are relatively small. Without question, the instruction tends to inhibit the amount of the jury award. If the jury knows that any amount it awards will be multiplied by three, it would be less than human if it did not make the mathematical computation to determine the amount that the "plaintiff will get", which leads to inevitable reduction by two-thirds of the amount to be awarded the Plaintiff, in order that the Plaintiff will ultimately obtain judgment for the amount the jury thinks he should receive. This defeats the very purpose of the inclusion of the treble damage provision. It should not be allowed. The Fifth Circuit, like the Tenth Circuit, has recognized this not only in the present case, but also in the case of *Pollock & Riley, Inc. v. Pearl Brewing Company*, 498 F. 2d 1240 (5th Cir. 1974) (with which this case was consolidated for argument in the lower court). It clearly represents the correct position.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed to opposing counsel of record this day of , 1975, by U. S. Mail, certified, postage prepaid and properly addressed.

Jack N. Price
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